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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 163.

CHARLES GAGNON, APPELLANT,

vs.

THE UNITED STATES AND THE SIOUX AND CHEYENNE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 3, 1906.

(18,742.)

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1 In the Court of Claims.

CHARLES GAGNON v. THE UNITED STATES and THE SIOUX AND Cheyenne Tribe of Indians.	No. 10380. Indian Depredation.

I.

(*Original Petition, Filed March* 1, 1894.)

Amended Petition.

(Filed April 10, 1902.)

To the honorable the Court of Claims:

The claimant, Charles Gagnon, respectfully represents:

I. That he is and was on the dates hereinafter mentioned a citizen of the United States and a resident of Rulo in the State of Nebraska.

II. That James W. Hosford and your petitioner were at the date hereinafter mentioned partners, doing business under the name of Hosford & Gagnon.

III. That the following property of the value of $15,500 was taken from said firm of Hosford and Gagnon, both members of which were at the date of the depredation citizens of the United States, by Indians of the Sioux and Cheyenne tribes or nations of Indians, which were then in amity with the United States and who were chargeable for said depredation by reason of a treaty between said Indians and the United States, about the 17th day of February, 1866, in the Territory of Wyoming, to wit: 9 head of
2 American horses, 18 head of mules, 159 head of cattle. Of this property so taken James W. Hosford owned one-half and the other half was owned by your petitioner Charles Gagnon, for which he here makes claim.

IV. That no claim for said property was presented to the Commissioner of Indian Affairs.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant prays judgment upon the facts and the law in the sum of seven thousand seven
r and fifty dollars.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my information, knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 10th day of April, 1902.

MARIE A. SEARLES,
[SEAL.] *Notary Public.*

3 II.—*General Traverse.*

And now comes the Attorney-General on behalf of the United States and answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney-General.

III.—*Findings of Fact and Conclusion of Law.*

Filed December 1, 1902.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Indians of the Sioux and Cheyenne tribes took property from the firm of Hosford & Gagnon, in the Territory of Wyoming, February, 1866, of the aggregate value of $15,500. The depredation was without just cause or provocation on the part of the owner or agent in charge.

II.

One half of the property so taken was owned by James W. Hosford, for which he had maintained suit under No. 3912 in this court and recovered judgment in the sum of $7,750, which judgment has been satisfied. The other half of the property so taken, amounting to $7,750, was owned by the claimant, Charles Gagnon, which half has not been returned or paid for.

III.

The Indians by whom the property was taken were members of a tribe in amity with the United States at the date of the depredation.

IV.

The claimant was born in Canada, a subject of the British Crown. He declared his intention to become a citizen of the United States

before the district court of Woodbury county, Iowa, March 12, 1858. It is claimed that he was admitted to become a citizen of the United States by the district court of the first judicial district of the Territory of Nebraska, within and for the county of Richardson, on the 25th day of September, 1863. The judge and clerk of said territorial court died before the proceedings were had in March,
4 1897, for the *nunc pro tunc* order. To establish his citizenship the claimant relies exclusively upon the following record, made by the district court for the first judicial district of the State of Nebraska (successor of said district court of the Territory), on application made March 29, 1897:

"Be it remembered that at a term of the district court holden in and for said county, in Falls City therein, on the 29th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, the following among other proceedings were had, to wit:

"*In re* CHARLES GAGNON, Application and Motion, *nunc pro tunc*, to Supply Record of Naturalization as a Citizen of the United States.

"This cause came on to be heard on motion of Charles Gagnon for an order *nunc pro tunc* to supply omission in the record wherein the judgment of naturalization of the said Charles Gagnon as a citizen of the United States pronounced by this court at its September term, A. D. 1863, was through negligence or inadvertence of the clerk unrecorded in the journal of said county, or if recorded the same has been lost or destroyed; and it appearing to the court by competent evidence that the said Charles Gagnon made application to this court at its September term, 1863, to be naturalized as a citizen of the United States, and having produced his certificate of his declaration of intention to become a citizen of the United States, made before the clerk of the district court for Woodbury county, in the State of Iowa, on March 12th, 1858, and that he thereupon produced in open court his witnesses, to wit, E. H. Johnson and John C. Blair, and after hearing the testimony of said witnesses as to the qualification of said Charles Gagnon to become a citizen of the United States, and the court being satisfied in the premises, granted an order admitting said Gagnon to such citizenship and administered to him the oath of allegiance required by law, and abjuration of all allegiance to Queen Victoria, Queen of England, of whom he was formerly a subject.

"And it having been made to appear further to this court that said judgment of naturalization was never recorded, and if recorded the record is lost and can not be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error or omission should be corrected, it is ordered and adjudged that said judgment so rendered by this court at its September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of natu-

ralization as provided by law, and that this applicant pay the costs of this proceeding.

"JNO. S. STULL,
"*Judge District Court.*

"March 30th, 1897.

"UNITED STATES OF AMERICA, }
"*The Territory of Nebraska, Richardson County,* } ss:

"Be it remembered that at a term of the district court holden in and for said county, in Falls City therein, on the 25th day of September, in the year of our Lord one thousand eight hundred and sixty-three, *was* present the Honorable E. S. Dundy, sole presiding judge, John P. Welty, sheriff of said county, and George Vanderventer, clerk of said court, when the following, among other proceedings, were had to wit: Charles Gagnon, a native of Canada, and at present residing within said Territory, appeared in open court and made application to be admitted to become a citizen of the United States, and it appearing to the satisfaction of the court that he had declared on oath before a clerk of the district court of Woodbury county, Iowa, a court of record having common-law jurisdiction, and using a seal, two years at least before his admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance to any foreign prince, potentate, State or sovereignty whatsoever, and particularly to Queen Victoria, Queen of England, of whom he was heretofore a subject; and said applicant having declared on oath before this court that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and adjure all allegiance and fidelity to every foreign prince, potentate, State or sovereignty whatsoever, and particularly to the power above named, the court being satisfied that said applicant has resided within the United States for the term of five years next preceding his admission, without being at any time during the said five years out of the territory of the United States, and within this State one year at least; and it further appearing to the satisfaction of this court that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same;

"Whereupon it is orderd by the court that the said Charles Gagnon be, and he is hereby, admitted to become a citizen of the United States.

"In testimony whereof I, George Vanderventer, clerk of the court aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Falls City, in said county, September 25th, 1863.

[SEAL.] "GEORGE VANDERVENTER,
"*Clerk of the District Court.*

"STATE OF NEBRASKA, }
"*Richardson County,* } ss:

"I, Chas. L. Mettz, clerk of the district court in and for the above-named county and State, do hereby certify that the within and foregoing is a true and perfect copy of the order and decree of the court rendered at the March, A. D. 1897, term of the district court, to wit, on the 30th day of March, 1897, as the same appears on the court records of said county, to wit, on Journal 10, pages 218, 219, and 220.

"Witness my official hand and seal this the 3rd day of April, A. D. 1897.

[SEAL.]

"CHAS. L. METTZ,
"*Clerk of the District Court.*

"STATE OF NEBRASKA, }
"*Richard[illegible] County,* } ss:

"I, Jno. S. Stull, judge of the district court of the first judicial district of the State of Nebraska, do hereby certify that the above-named Charles L. Mettz is the clerk of said court in and for said Richardson county, State of Nebraska, and as such clerk he is the custodian of the records and seal of said court; that said Richardson county is a part of said first judicial district of the State of
6 Nebraska; that the above and foregoing authentication is in due form and in all respects in accordance with the laws of the State of Nebraska.

"Witness my hand this 12th day of May, 1897.

"JNO. S. STULL,
"*Judge of the District Court of the 1st Judicial*
"*District of the State of Nebraska.*"

Prior to said application, to wit, on March 19, 1897, the following notice was served on the Attorney-General:

"MARCH 19, 1897.

"Hon. Joseph McKenna.

"SIR: In further response to the letter of February 10, 1897, by Charles W. Russell, acting Assistant Attorney-General in charge of Indian depredation claims, we now advise you that application will be made to the district court of Richardson county, Nebraska, on the twenty-ninth day of March, 1897, on behalf of Charles Gagnon, for restoration of certain lost records relative to the naturalization of said Gagnon.

"You will please take notice of this proceeding, as it is the purpose of the claimant in causes Nos. 3912, 3913, 10379, 10380, and 10382, Indian depredation, in the Court of Claims, to present duly authenticated copies of said restored record (should it be restored) as evidence on behalf of claimants.

"Very respectfully,

"CHARLES AND WM. B. KING."

V.

A search of the records of the district court of Richardson county, Nebr., at Falls City, made by a special attorney of the Department of Justice, and admitted as evidence by agreement of parties, discloses the following facts:

"From the organization of the court down to and including the year 1862, the records are complete and include an appearance docket, a trial calendar upon which is docketed every case that was tried, and upon which also *is* shown the minutes made by the judge at the time the cases were heard. There are also journals of the court in which are spread at length the orders entered in the various cases tried. Subsequent to the year 1863 there are also appearance dockets, trial dockets, and journals, kept in practically the same form as at present, showing the action of the court, as in those prior to 1863. The appearance docket covering the year 1863 is one which was begun prior to that year, and which covers the year 1862. It also covers the year 1864 and several years subsequent thereto. This appearance docket, however, shows but the entry of five cases during the year 1863. The cases at that time were docketed three upon a page, and there are numerous blank pages after the docketing of the last five cases for 1863, before the docketing of the first case in 1864. The first trial docket made up after the year 1862 has upon it each of the five cases appearing upon the appearance docket for 1863, and also shows forty-seven other cases docketed during the year 1863, but not appearing upon the appearance
7 docket. Some of these show, however, that they are petitions for new trial, cases appealed from justice court, motions for confirmation of sheriff's sales, transfers of cases from other counties, and other proceedings which an inspection of the appearance docket shows it evidently was not the custom to place upon the appearance docket. Deducting matters of this nature from the full number of cases docketed upon the trial docket which had been filed in 1863 leaves such a number of cases as should have appeared upon the appearance docket as could be docketed upon the pages left blank in the appearance docket between the cases docketed in 1863 and those docketed in 1864.

VI.

There is no record or memorandum or other paper of any kind in the records of said court or among the files thereof showing or relating to an application by Charles Gagnon for naturalization before said district court, nor was there any such paper in the records of said court on the 29th and 30th days of March, 1897, when the proceedings for restoration of the record of naturalization were taken, nor does it appear that a certificate of naturalization was ever issued or delivered to the claimant.

VII.

Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the claimant, Charles Gag-

non, was not at the time of the depredation a citizen of the United States.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant not having been a citizen of the United States at the time when the depredation was committed, this court has not jurisdiction, and the petition is therefore dismissed.

IV.—*Opinion of Court of Claims.*

Filed December 1, 1902.

PEELLE, *J.*, delivered the opinion of the court.

The question presented is: Was the claimant a citizen of the United States at the date of the depredation complained of in February, 1866?

The claimant grounds his right to citizenship on the facts set forth in finding IV, which in brief are that he was born in Canada; declared his intention to become a citizen of the United States before the district court of Woodbury county, Iowa, in March, 1858, and claims that thereafter on September 25, 1863, he was admitted by the district court of Richardson county, in the Territory of Nebraska, to become a citizen of the United States, but no record appears to have been made thereof.

Some thirty-three years thereafter, on the application and motion of the claimant before the district court of said county for an order *nunc pro tunc* to supply the record of his naturalization as a citizen of the United States, on the ground that the judgment of naturalization "was through the negligence or inadvertence of the clerk unrecorded in the journal of said county, or if recorded the same has been lost or destroyed," the court found that the claimant had been admitted to citizenship on September 25, 1863, and ordered that the judgment thereof be entered at large on the journal of the court *nunc pro tunc* as of the date aforesaid.

8 The question of the claimant's naturalization, as well as the existence of the record thereof, or of any memorandum paper pertaining thereto, as the basis for the court's jurisdiction, is controverted by the defendants, and in support of their contention they rely on the facts set forth in findings V and VI, which, in substance, are that the records of the district court of the Territory of Nebraska for the year 1863, and prior and subsequent thereto, are now complete and intact, showing entries in sundry cases at the various terms of said court during that period, but no record of any proceedings showing the naturalization of the claimant.

That no memorandum or other paper of any kind was in the records of said court on the 29th and 30th of March, 1897, when the proceedings for the restoration of the records of naturalization were

taken, and that it does not appear that a certificate of naturalization was ever issued or delivered to the claimant.

The issue thus made raises the question, Did the district court of Richardson county, Nebr., in 1897, have jurisdiction to supply the alleged record of naturalization of September, 1863, by a *nunc pro tunc* order?

If it did, then this court is bound thereby and the claimant, being a citizen at the date of the depredation, is entitled to recover the sum of $7,750 found due him as set forth in finding II; otherwise citizenship being jurisdictional under the act of March 3, 1891 (26 Stat. L., 851), the claimant's petition must be dismissed.

From the facts found it is clear that the *nunc pro tunc* order of 1897 supplying an unrecorded judgment of naturalization alleged to have been rendered in 1863 was based entirely upon oral testimony. The court's records of 1863 are not only silent as to what was done, but no paper or memorandum of any kind was among the records or before the court in 1897 from which the court could infer that such a proceeding had been commenced. The proceedings in 1897 therefore were not to amend a defective or incomplete record of which there was some basis to show a mistake, but were to supply an alleged omitted record in a matter wherein the record and files of the court not only fail to show that any proceedings were had, but fail to show that any such proceedings had been commenced.

Blackstone in his Commentaries, volume 3, page 407, in speaking of writs of error says: "Formerly the suitors were much perplexed by writs of error brought upon very slight or trivial grounds, as misspelling and other mistakes of the clerks, all which might be amended at common law, while all the proceedings were in paper, for they were then considered as only in *fieri* and therefore subject to the control of the courts. But when once the record was made up it was formerly held that by the common law no amendment could be permitted, unless within the very terms in which the judicial act as recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration. But now the *the* courts are becoming more liberal and, where justice requires it, will allow of amendments at any term while the suit is depending, notwithstanding the record is made up and the term be passed. For they at present consider the proceedings as in *fieri* until judgment is given, and therefore that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term."

The origin and history of the general doctrine of amend-
9 ments as outlined in that commentary, page 408, are well stated in the case of *Bilansky v. State of Minnesota* (3 Minnesota, 427–429).

In that case, which was a capital one, the court said: "If a jury is sworn according to law, or any other of the ordinary proceedings take place in the progress of the trial of a cause, and the clerk omits to record the fact, we see no reason why the record should not be

made to conform to the truth, even after the term, when there exists no doubt about what the truth is. Every reason is in favor of such change being made; public justice demands it, as well for the punishment of the offender as for the protection of the accused, according as the nature of the proposed amendment may operate."

Bishop on Criminal Law, section 1160, says: "When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, cannot then be opened and modified or set aside. Neither, it has been held, can the clerk at a subsequent term make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk, proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

In the case of *In re Wight* (134 U. S., 136–144), the court, after quoting the above section, says: "The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply omissions in the record of what was done at the time of the proceedings. An extensive list of authorities is cited in the footnote of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk has made no entry, the following cases directly affirm that proposition: *Galloway, administrator, v. McKeithen*, 5 Ired. (Law), 12; *Hyde v. Curling*, 10 Mo., 374; *State v. Clark*, 18 Mo., 432; *Nelson v. Barker*, 3 McLean, 379, and *Bilansky v. The State of Minnesota*, 3 Minnesota, 427."

In the case of *Hyde v. Curling* (*supra*), which was a civil suit, it was held, as stated in the syllabus, that "a court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*." And in the case of *Nelson v. Barker* (*supra*), where an objection was made to the amendment on the ground that there was nothing to amend by, the court said: "At common law the court could only give leave to amend when there was something to amend by, and anciently amendments were required to be made at the term at which the error occurred, but now an amendment may be made at any time before judgment, and in some cases after judgment." But that ruling appears to be based on section 32 of the judiciary act of 1789, known as the statute of jeofailes and amendments of the United States now embodied in Revised Statutes, section 954.

So that the reliance by the claimant's counsel on the case of *In re Wight, supra*, to support the doctrine that the court is not re-

10 stricted to record evidence in amending its record after the term at which the proceedings were had does not appear to be well founded, as the court, citing section 954, saying, "it is as liberal in the powers which it confers on the courts to make amendments as any of those enacted in more modern times," adds that, "we are forced to the conclusion that the action of the circuit court in making the order for a *nunc pro tunc* record, which showed that the case had been remanded from that court to the district court prior to the time when the sentence was passed upon the prisoner, was a legitimate exercise of power."

It will thus be seen that the language in that opinion, saying in effect that the court is not restricted to record evidence in amending its record at a subsequent term, must be read in connection with section 954.

The supreme court of Indiana has been uniform in its holding that after the expiration of the term *nunc pro tunc* entries to amend the record of a proceeding at a prior term can only be made upon some record or memorandum paper or other minutes in the case from which it can be clearly shown what took place. (*Boyd v. Blaisdell*, 15 Ind., 73; *Jenkins v. Long*, 23 Ind., 460; *Makepeace v. Lukens*, 27 Ind., 437; *Hamilton v. Burch*, 28 Ind., 233; *Miller v. Royce*, 60 Ind., 189, and *Schoonover v. Reed*, 65 Ind., 313.)

In the last case cited the court, quoting from the case of *Wilson v. Vance* (55 Ind., 394), said: "The office of a *nunc pro tunc* entry is to make a record of what was previously done, but not then entered; not to make an order, now for then, but to enter, now for then, an order previously made.

That is to say, the function of a *nunc pro tunc* entry is to enter now for then the order previously made and not to make an order now to supply the court's omission to make one then.

To the same effect also are the decisions of the supreme court of Illinois. (*Coughram v. Gutcheus*, 18 Ill., 390, approved in 94 Ill., 525, and 165 Ill., 417.)

In the case of *Balch v. Shaw* (7 Cush., 282–284), in speaking of the power of the courts during and after the term to correct clerical errors, the court said: "There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*. The length of time in this case, between the granting of the license and making up the record, does not take away the right or jurisdiction of the court." But the court further said: "This was not a case of want of jurisdiction, in which the record can not be amended, because, there being an omission to act, there is nothing to record; in such case the defect is not in the record, but in the action of the court."

The converse of that appears to us to apply to the present case; that is to say, there was nothing before the court making the *nunc pro tunc* entry to show that it was the entry of an order previously

made. There was no record or memorandum of any kind before the court from which it could be inferred that the proceedings for the naturalization of the claimant had taken place or had ever been commenced, and for that reason the court's jurisdiction was wanting unless the omission of such record and paper can be supplied by the recollection of witnesses a generation thereafter.

Furthermore, the matter was not in the breast of the court,
11 for the judge who held the court in 1863, as well as the clerk thereof, had theretofore died.

The proposition that a record can not be amended after the term unless there is something in the record to amend by is supported by many cases, other than those cited, some of which are *Lynch v. Reynolds*, 6 Bush. (Ky.), 547; *Shackleford v. Levy*, 63 Miss., 128; *Smith v. Hood*, 25 Pa., 218; *State ex rel. v. Prim*, 61 Mo., 166, and many other cases which might be cited.

Such was the view of Bishop in regard to the manner of making amendments, for in his Criminal Procedure, section 1345, he says: "The better way is believed to be to make, in the record of the term at which the amendment is offered, an entry to the effect that, *whereas on inspection of the record of the preceding term an error therein appears*, etc., it is considered that the same be corrected and amended, etc., setting out the amendment."

True, in the case of *Balch v. Shaw* (*supra*) it is said: "It was further said in argument that there was no sufficient material from which to make up the record. But the court of common pleas, having exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed."

That was said with reference to the issue in that case, which was one of law, there being no question of fact in dispute, and that was that "if the court should be of the opinion that there was a sufficient record of the order of the court of common pleas, made at the October term, 1824, to sell the demanded premises, judgment should be rendered for the tenant," who was relying on the order then made to support his title acquired by purchase at the sale thereunder.

The court held that there "was a sufficient record of the order of the court of common pleas" to sell the premises, and hence there was no question of jurisdiction; and the court of common pleas having, as the court say, "the exclusive right and jurisdiction in the matter," such court was the judge "of the proofs and of the sufficiency of the proofs upon which to proceed."

In the case of *Fay v. Wenzell* (8 Cush., 315), which was a case of assumpsit on a promissory note, where the jury returned a verdict for the plaintiff and the defendant moved for a new trial, as appears from a written motion filed in the case, no entry of the motion appeared on the docket, but there was an indorsement on the motion for a new trial made by the judge before whom the motion was argued, directing, in substance, that the motion should be overruled and judgment be entered upon the verdict, but no entry thereof was

made on the docket. After the indorsement of the motion as aforesaid the case was continued from term to term.

The plaintiff contended that the entry was erroneous and had been made by mistake, and offered parol evidence thereof in addition to the written motion and the indorsement thereon, while the defendant insisted that the memorandum on the docket constituted the record of the proceedings in the case, and denied the authority of the court to alter and annul the record of the doings of the court at a former term, and also objected to the competency of the evidence offered by the plaintiff; but the presiding judge overruled the objections and received the evidence and entered on the docket

12 the following order: "And now it appearing to the court here that the entry on the docket at the December term, 1848, 'verdict set aside, new trial granted,' is erroneous and was made by mistake, and that no such order was ever made by the court, it is now ordered that the said minute be struck out and erased; and it also further appearing that the entry in the docket at the December term, 1849, 'judgment on the verdict' is erroneous, and that the same ought to be arrested, it is ordered by the court here that the said minute be struck out and erased. And now at the present term of court it is ordered and determined by the court that the motion of the defendant for a new trial be overruled and disallowed, and that judgment be now entered on the verdict."

On appeal, the court, among other things, said: "In the present case the court of common pleas had the power to order this amendment of the record. The amount and kind of evidence requisite to satisfy that court, as to what was the real order of the court and what was the proper entry on the docket or extended record, must rest with that court. Having the authority to correct their own record, it is to be presumed that any amendment of the record made by them will be in accordance with the facts." There it will be observed there were papers among the files and indorsements thereon which gave the court jurisdiction in the premises, and jurisdiction once acquired the court could admit such evidence, oral or otherwise, as it saw fit to ascertain the truth of the matter.

The claimant's counsel ably contend, and cite numerous authorities to support their contention, that a court of record has the inherent right and power to make *nunc pro tunc* entries to correct mistakes so as to conform its record to the actual truth of past transactions; and that contention, in view of the numerous authorities, both of the Supreme Court of the United States and of the several States, cannot be controverted. But the authorities cited by the claimant, as well as others we have examined, are all in cases where it appeared from the record that a cause was pending, and in many cases there was some memorandum, minute, or indorsement on the records or on the papers among the files sufficient to give the court jurisdiction to proceed; and where there is sufficient substance the record may be supplemented by oral testimony, but where there is a total absence of substance—*i. e.*, no record, paper, or memorandum—from which it could be inferred that any such proceeding was even

commenced, there is nothing to amend. Hence the alleged certificate of naturalization in this case purporting to be "an order *nunc pro tunc* to supply omission in the records wherein the judgment of naturalization" of the claimant as a citizen of the United States pronounced by the court at its September term, 1863, and which it is claimed was through negligence or inadvertence of the clerk unrecorded, or if recorded, lost or destroyed, is not conclusive, and may properly be attacked in this court. (*Thompson v. Whitman*, 18 Wall., 457; *Cole v. Cunningham*, 133 U. S., 107; *Simmons v. Saul*, 138 U. S., 439, 448.)

While lapse of time in a proper case may not take away the right or jurisdiction of a court to make *nunc pro tunc* entries to conform its record to the truth, it is an element to be considered in this case, where there is a total absence of any record showing that the claimant ever applied to become a citizen, and hence the *nunc pro tunc* entry was rather an original order made now for then than an entry made now for then of an order previously made.

13 In the case of *Brown v. Coward* (3 Hill, S. C.), where the clerk had made no entry on the minutes of the court of a judgment in summary process, it was held that there was nothing on which a *scire facias* to revive could issue; nor would a motion to amend by entering judgment *nunc pro tunc* be granted for the reason that there was no judgment to amend; that "where judicial proceedings are imperfect, the court to which they belong will amend them, as long as there is anything to amend." That language is (J. R.) applicable to the present case. There is no substance upon which to ground a right to amend, especially after the lapse of a generation.

Therefore the authorities cited by the claimant in support of the proposition that the certified copy of the record of naturalization of an alien, like any other record of a court, imports verity, are not in point, for the reason that there was nothing in the record or among the files of the court to show that any such judgment had either been entered or ordered to be entered. There was nothing to amend—no mistake to correct.

No certificate of naturalization appears to have been issued to the claimant at the time he claims to have been naturalized, and hence the beginning of the proceeding as well as the action of the court rests solely in the recollection of witnesses. Therefore, we are not disposed to accept the certificate of the *nunc pro tunc* judgment of naturalization as sufficient to establish the claimant's citizenship, and his petition will accordingly be dismissed.

Howry, J., did not sit in this case and took no part in the decision.

14 V.—*Judgment of the Court.*

CHARLES GAGNON
vs.
THE UNITED STATES and THE SIOUX AND Cheyenne Indians. } No. 10380. Indian Depredation.

At a Court of Claims held in the city of Washington on the first day of December 1902 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant Charles Gagnon be dismissed.

BY THE COURT.

15 VI.—*Appeal to the Supreme Court of the United States and Allowance of Same.*

In the Court of Claims, December Term, 1902.

CHARLES GAGNON
v.
THE UNITED STATES ET AL. } No. 10380. Indian Depredation.

Appeal.

Now comes the claimant, Charles Gagnon, and appeals to the Supreme Court of the United States, from the judgment of this court, entered on the first day of December, 1902, dismissing his petition, and moves for an allowance of this appeal.

WM. B. KING,
Attorney for Claimant.

Filed December 3, 1902.

The aforesaid application for the allowance of appeal having been filed in open court, December 3, 1902, it was ordered that the same be allowed as prayed for.

BY THE COURT.

Court of Claims.

CHARLES GAGNON
v.
THE UNITED STATES ET AL. } No. 10380. Indian Depredation.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings on the above entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment

of the court, of the application for and allowance of appeal
16 to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said Court of Claims this 8 day of December, 1902.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 18,742. Court of Claims. Term No. 163. Charles Gagnon, appellant, *vs.* The United States and The Sioux and Cheyenne Indians. Filed December 8th, 1902.

FILE COPY. 15126

Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 183.

CHARLES GAGNON, Appellant,

v.

THE UNITED STATES and the SIOUX AND CHEYENNE INDIANS.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES GAGNON
v.
THE UNITED STATES
and the
SIOUX AND CHEYENNE INDIANS. } No. 163.

BRIEF FOR APPELLANT.

I. Statement of the Case.

The Claim.

This is a claim presented to the Court of Claims under the act of March 3, 1891 (26 Stat. L. 851), "To provide for the adjudication and payment of claims arising from Indian depredations."

The court found the facts as regards the seizure and value of the property as follows (Record, p. 2):

"I. Indians of the Sioux and Cheyenne tribes took property from the firm of Hosford & Gagnon, in the Territory of Wyoming, February, 1866, of the aggregate value of $15,500. The depredation was without just cause or provocation on the part of the owner or agent in charge.

"II. One-half of the property so taken was owned by James W. Hosford, for which he had maintained suit under No. 3912 in this court and recovered judgment in the sum of $7,750, which judgment has been satisfied. The other half of the property so taken, amounting to $7,750, was owned by the claimant, Charles Gagnon, which half has not been returned or paid for.

"III. The Indians by whom the property was taken were members of a tribe in amity with the United States at the date of the depredation."

Record of Naturalization.

Findings IV, V and VI (pp. 2–6) may be summarized as follows:

The claimant was born in Canada, a subject of the British Crown. He declared his intention to become a citizen of the United States before the District Court of Woodbury County, Iowa, March 12, 1858. It is claimed that he was admitted to become a citizen of the United States by the District Court of the first judicial district of the Territory of Nebraska, within and for the County of Richardson, on the 25th day of September, 1863. The judge and clerk of said territorial court died before the proceedings were had in March, 1897, for the *nunc pro tunc* order. To establish his citizenship the claimant relies exclusively upon the record made by the District Court for the first judicial district of the State of Nebraska, successor to said District Court of the Territory, on application made March 29, 1897. In this order it is recited that it appeared to the court by competent evidence that Gagnon, the claimant, made application to the court at its September Term, 1863, to be naturalized as a citizen of the United States; that he produced his certificate of declaration of intention and his witnesses; that after hearing the testimony of those witnesses as to his qualifications, the court being satisfied, granted an order admitting him to citizenship, and administered the oath of allegiance and abjuration required by law; that the judgment of naturalization was never recorded, and if recorded, the record is lost, and cannot be found; that it is legal and proper that the record be supplied; and the court therefore orders that the judgment ren-

dered by that court at its September Term, 1863, be entered at large on the journal as of the day when it should have been entered, September 25, 1863, and that the clerk issue to the applicant the proper certificate of naturalization. This was done; and the restored certificate dated September 25, 1863, reciting the proceedings as having taken place on that date appears in the record (p. 4).

Notice to Attorney-General.

Prior to making the application, notice was served on the Attorney-General, March 19, 1897 (foot of p. 5), that it would be made, it being stated in the notice that it was for the purpose of presenting to the Court of Claims "authenticated copies of said restored record (should it be restored) as evidence" in this case.

Condition of District Court Record for 1863.

Finding V (p. 6) contains the result of a search of the records of the district court of the county, by a special attorney of the Department of Justice, admitted as evidence by agreement of parties, in regard to the state of the dockets of that court in the year 1863, as well as before and after, from which it appears that up to and including the year 1862, the records are complete and include an appearance docket, a trial calendar and journals; subsequent to 1863 there are also appearance dockets, trial dockets and journals; for the year 1863 the appearance docket, containing numerous blank pages, and the trial docket are shown to exist. Nothing is said about a journal for 1863.

Absence of Record or Memorandum.

Findings VI and VII (pp. 6, 7) are as follows:

"VI. There is no record or memorandum or other paper of any kind in the records of said court or among

the files thereof showing or relating to an application by Charles Gagnon for naturalization before said district court, nor was there any such paper in the records of said court on the 29th and 30th days of March, 1897, when the proceedings for restoration of the record of naturalization were taken, nor does it appear that a certificate of naturalization was ever issued or delivered to the claimant.

"VII. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the claimant, Charles Gagnon, was not at the time of the depredation a citizen of the United States."

Opinion of Court of Claims.

The court held in the opinion delivered by Judge Peelle (pp. 7–13) that the restored record could not be accepted as evidence of naturalization, and therefore that the claimant was not a citizen of the United States at the time the depredation was committed. The case is reported 38 C. Cls. 10.

Judgment and Appeal.

Judgment was rendered dismissing the petition (p. 14). The claimant thereupon appealed to this court (p. 14).

II. Assignment of Error.

The appellant hereby assigns for error that the Court of Claims failed to give full faith and credit to the record of the district court for the first judicial district of the Territory of Nebraska in and for the County of Richardson, as restored by the district court for the first judicial district of the State of Nebraska, successor of said district court of the Territory, containing the judgment of his naturalization, and found that the appellant was not a citizen of the United States at the time the depredation was committed in 1866 and rendered judgment dismissing his petition;

Whereas, said Court of Claims should have held that full faith and credit was due to the record of naturalization in said district court for the first judicial district of the Territory of Nebraska in and for the County of Richardson, as restored by the district court for the first judicial district of the State of Nebraska, successor of said district court of the Territory, and should accordingly have held that the appellant was a citizen of the United States from the date of his admission as such by said district court of the Territory, September 25, 1863, and should have given judgment in his favor.

III. Brief of Argument.

The Question Stated.

The findings of the court show that the property for which payment is claimed belonged to the firm of Hosford & Gagnon; that the other partner, Hosford, has already recovered a judgment for his half; and that the remaining one-half belonged to the claimant, Charles Gagnon.

This court decided in *United States* v. *Burns*, 12 Wall. 246, 254, that the claims of partners where depending upon a difference of personal status between the members of the partnership might be severally prosecuted by each partner for his separate interest, the Court of Claims not being bound by any special rules of pleading in this respect.

The Court of Claims correctly states at the opening of its opinion (p. 7) the sole question involved in the case. "The question presented is: Was the claimant a citizen of the United States at the date of the depredation complained of in February, 1866?"

In the decision of that question this court is not concluded by the finding of the Court of Claims as to the ultimate fact that the claimant was not at the time of the depredation a citizen of the United States.

The findings are framed by the Court of Claims in accordance with the rule laid down by this court in *United States* v. *Pugh*, 99 U. S. 265, where the third paragraph of the syllabus correctly states the effect of the decision on this point:

"The judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is, if the question is properly presented, subject on appeal to be here reviewed; and where the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record."

This is also in accordance with what was said by this court in *United States* v. *Clark*, 96 U. S. 37, 39:

"It is clear that upon this testimony alone the Court of Claims fixed the sum lost by claimant. We are asked by the counsel for the government to hold that it is not competent evidence to establish that fact.

"It is manifest that, before we can do this, we must also hold that where that court has found in due form, and presented to us one of those ultimate facts which it is required to find, and which is necessary to its judgment, and has at the same time presented as part of its findings all the evidence on which that fact was found, we can look at both findings to see whether that evidence was competent proof of that fact. This is precisely what was done in *Moore* v. *United States*, 91 U. S. 270."

The question, therefore, presented by this record is whether the circumstantial facts found in detail in Findings IV, V and VI (pp. 2–6) warrant the ultimate finding contained in Finding VII, that the claimant was not at the time of the depredation a citizen of the United States. It is claimed on his behalf that they not only did not warrant that finding but that they conclusively show that

he was at the time of the depredation a citizen of the United States.

Statute Making District Court Successor.

Immediately upon the admission of Nebraska as a State the legislature passed an act approved June 15, 1867 (Laws of Nebraska, 1867, p. 58), making the District Courts of the State successors to the District Courts of the Territory.

"An Act to transfer suits at law and in chancery, prosecutions, judgments, decrees and proceedings in the courts of the Territory of Nebraska, to the courts of the State of Nebraska.

"SEC. 2. The records in all suits at law and in chancery, and all prosecutions, recognizances, bonds for appeals, and proceedings in error, judgments, decrees, orders, records, files, and proceedings pending and remaining in the district courts of the Territory of Nebraska, in the respective counties thereof, except such suits wherein the United States of America is a party, shall be, and the same are hereby, transferred to the respective district courts of the State of Nebraska, and all said suits at law and in chancery, recognizances, prosecutions, bonds for appeal and proceedings in error, shall be proceeded in, by, and all said judgments, decrees, orders, records, files, and proceedings, except as aforesaid, shall become, and are hereby made the judgments, decrees, orders, records, files, and proceedings of the said respective district courts of the State of Nebraska, as effectually, in all respects, as though said suits at law and in chancery and prosecutions had been originally instituted, and all said bonds, judgments, recognizances, decrees and orders had been originally obtained, rendered and made, and all said records, files, and proceedings had originated in the said respective district courts of the State of Nebraska; and that all said judgments, decrees, and orders aforesaid, may, and shall be enforced, by executions, orders of sale or otherwise, as effectually by the said respective district courts of the State of Nebraska, as though the same had

been obtained, rendered and made in said respective district courts last aforesaid."

Proceedings Restoring Record Regular.

By Section 905 of the Revised Statutes, it is provided as follows:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The certificate contained in the record (pp. 3–5) complies strictly with the requirements of this section.

Among the recitals of the proceedings so produced is the following:

"It appearing to the court by competent evidence that the said Charles Gagnon made application to this court at its September Term, 1863, to be naturalized as a citizen * * * and the court being satisfied in the premises, granted an order admitting said Gagnon to such citizenship and administered to him the oath of allegiance required by law. * * *

"And it having been made to appear further to this court that said judgment of naturalization was never recorded and if recorded the record is lost and can not be found in the records of this court." (Finding IV, bottom p. 3.)

In the court below the defendants attacked the validity of the proceeding and undertook to show that none of the records had been lost and the court says in its opinion (p. 7), "In support of their contention they rely on the facts set forth in Findings V and VI, which, in substance, are that the records of the district court of the Territory of Nebraska for the year 1863, and prior and subsequent thereto, are now complete and intact."

The facts found do not sustain this statement of the court. An examination of Finding V will show—

1. From the organization of the court down to and including the year 1862, the records are complete and include an appearance docket, a trial calendar and a journal.

2. Subsequent to the year 1863 there are also appearance dockets, trial dockets and journals.

3. The appearance docket covering the year 1863 is shown to exist, though it contains blank pages, and the trial docket for this year also exists, as is shown by the references to it. But the one important and material record of the court, the journal for 1863, has not been shown to be in existence.

The journals existed down to and including the year 1862 and subsequent to the year 1863, but the journal for 1863, the record of the court, which in all probability is the one in which the record of the claimant's naturalization was made, is not shown to be in existence. It is therefore an error to say that the records for the year 1863 "are now complete and intact." If the journal of the court is lost, it is not at all remarkable that "there is no record or memorandum or other paper of any kind in the records of said court or among the files thereof showing" the claimant's naturalization (Finding VI, p. 6).

Naturalization—Requirements.

While in some of the older jurisdictions the practice has grown up of requiring written applications for naturalization, there was no statute requiring it when this claimant was naturalized in 1863.

The statutes in regard to naturalization in force September 25, 1863, provide:

"That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—

"*First*, That he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least, before his admission, that it was, bona fide, his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.

"*Secondly*, That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court." (2 Stat. L. 153.)

This act was amended by section 4 of the act of May 26, 1824 (4 Stat. L. 69), so that a declaration of intention made two years before his admission shall be sufficient. These acts have been carried into the Revised Statutes of the United States as section 2165.

The statute requires therefore that the party shall make a declaration on oath before the court and that the clerk of the court shall record the proceedings. The de-

claration on oath by the applicant gives the court jurisdiction; not the recording of the proceeding by the clerk. The court will take judicial notice of the fact, for it is a fact of general history, that the Territory of Nebraska in the year 1863, was a new and sparsely settled country and that judicial proceedings were not carried on with the technical formalities which obtained in older jurisdictions where the business of the courts was much greater and more complicated.

It was the duty of the clerk, under the statute, to make record of the proceedings. It is usual to record all matters of this kind, which are *ex parte*, and which are transacted openly in court, in the journal. Indeed, we may say, from the record in this case that the practice of the court in question was to record naturalization proceedings in the journal; for the court when in 1897 restoring the record, directed that the judgment be entered at large on the journal of the court, and it is recorded in Journal 10, pp. 218, 219 and 220 (p. 5). If the journal for 1863 was not in the court it is not to be expected that any record of the claimant's naturalization would exist, and therefore Finding VI is immaterial.

Naturalization Judgments Conclusive.

It has been held since the earliest times that naturalization proceedings are conclusive where they were had in a court of competent jurisdiction. Chief Justice Marshall in the case of *Spratt* v. *Spratt*, 4 Pet. 393, 407, 408, speaking of naturalization proceedings, says:

"The various acts upon the subject submit the decisions on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

In *The People* v. *Pease*, 30 Barb. 588, 604, the court said:

"The judge at the trial also suffered the party to attack the certificate of naturalization by evidence aliunde, and to show that it was procured by fraud; that its recitals were false, and that the party was not entitled to be naturalized. The certificate was the legal evidence of the judgment of a court of competent jurisdiction collaterally in question in the action. It was final and conclusive. It imported absolute verity, and could not, if valid on its face, be thus impeached in this action. When alienage is in issue, the judgment of the court admitting the alien to become a citizen is conclusive evidence upon that point. (*Ritchie* v. *Putnam*, 13 Wend. 524.) A record of naturalization can not be contradicted by extrinsic proof that no declaration of intention had in truth been made. (*Banks* v. *Walker*, 3 Barb. Ch. Rep. 438.) Like any other judgment, it is complete evidence of its own validity. (*Spratt* v. *Spratt*, 4 Peters, 393.)"

In the case of *The People* v. *McGowan*, 77 Ill. 644, 646, the people offered to prove that McGowan had not declared his intention to become a citizen prior to the date of his naturalization, and other facts tending to show that he was not then qualified to be a citizen. This evidence was excluded by the lower court, and on this point the court above said:

"In the exclusion of this testimony, the court ruled correctly. The record of naturalization of an alien, like any other record of a court, imports verity. It can not be impeached for fraud unless that defense has been specially pleaded, setting forth in what the fraud consists. No replication had been filed alleging fraud, nor that the court had not jurisdiction of the person of defendant. The replication as to jurisdiction is, that the court did not have jurisdiction of the subject matter, but does not put in issue the jurisdiction of the court as to the person of defendant; hence, the evidence was properly rejected. But had the issue been made by the pleadings, we are still of opinion the evidence was inadmissible. It

seems clear, both on principle and authority, a record of naturalization, made by a court of competent jurisdiction, can not be impeached, in a collateral proceeding, by showing that the preliminary steps required by law have not, in fact, been taken. It is upon the principle such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will be indulged the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all facts recited in the record. *Spratt* v. *Spratt*, 4 Peters, 393; *The People* v. *Pease*, 30 Barb. 588; *Campbell* v. *Gordon and Wife*, 6 Cranch, 176; *McCarthy* v. *Marsh*, 1 Selden, 263."

In *State* v. *Hoeflinger*, 35 Wis. 393, 400, the court held that the record of naturalization was conclusive upon the question in a collateral proceeding. "It was the record of a judgment, and imports absolute verity."

This doctrine has been carried to such an extent that United States courts have refused to cancel a certificate of naturalization because it had been obtained by fraud.

In *United States v. Gleason*, 78 Fed. Rep. 396, in the Circuit Court for the Eastern District of New York, an attempt was made to set aside a certificate of naturalization on the ground that it had been obtained upon false representations made to the court, but the bill was dismissed on the ground that the naturalization in the Superior Court of the City of New York must be held conclusive.

The court in its opinion says, referring to the allegation that false statements had been made in procuring the decree of naturalization—

"But, whatever the fact was, the administration of the oaths and issuing of the certificate showed the satisfaction of the court as to the requirements, constituting a

judgment of admission to citizenship, with the force of such a judgment upon the status of the applicant."

"In *Campbell* v. *Gordon*, 6 Cranch, 176, Washington, J. said:

"'But if the oath be administered, and nothing appears to the contrary, it must be presumed that the court, before whom the oath, was taken, was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights.'"

The court quotes the paragraph from *Spratt* v. *Spratt*, 4 Pet. 393, *supra*, p. 11, and continues:

"And in *ex parte* Cregg, 2 Curt. 98, Fed. Cas. No. 3380, Mr. Justice Curtis, upon a question as to the court, said:

"'The importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, "should prevent allowing any requirement of an act of Congress from having its full weight" in an application for this great right, so as to make an absolute and unimpeachable grant of it.'

"The conclusive effect everywhere of such judgments affecting the status of persons is alluded to in *Hilton* v. *Guyot*, 159 U. S. 113, at page 167." (78 Fed. Rep. 398.)

An appeal was taken by the United States to the Circuit Court of Appeals, 2d Circuit, where the decision of the lower court was affirmed. (90 Fed. 778.)

See also *State* v. *MacDonald*, 24 Minn. 48; *In re Christern*, 43 N. Y. Super. Ct. (11 Jones & Spencer) 523; *In re Coleman*, 15 Blatchford, 406, 6 Fed. Cases, No. 2980.

Proceedings Collaterally Questioned.

The Court of Claims undertook to pass upon the validity of the proceedings in the district court, in a collateral proceeding, and upon evidence *aliunde* (Findings

V and VI, p. 6, and opinion, p. 7). The validity of a judicial record can not be questioned by a court not sitting in review, except upon the ground that the court lacked jurisdiction. In *Voorhees* v. *Bank of the United States*, 10 Pet. 449, 474, 475, the court said:

"A judgment or execution irreversible by a superior court, can not be declared a nullity by any authority of law, if it has been rendered by a court of competent jurisdiction of the parties the subject matter, with authority to use the process it has issued: it must remain the only test of the respective rights of the parties to it."

And further:

"The errors of the court do not impair their validity: binding till reversed, any objection to their full effect, must go to the authority under which they have been conducted. If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under colour of law, which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority.

"The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper: there can be no middle character assigned to judicial proceedings, which are irreversible for error."

In *Cooper* v. *Reynolds*, 10 Wall. 308, 315, 316, this court, in an opinion delivered by Mr. Justice Miller, says:

"The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be.

Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

"It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction in the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

In the case of *Robinson* v. *Fair*, 128 U. S. 53, was brought in question the right and power of a circuit court of the United States to examine into a decree of partition made by a probate court of the State of California, and on this point this court said (p. 86):

"The Circuit Court of the United States had no jurisdiction to set aside that decree, merely upon the ground of error, nor could it refuse to give it full effect, unless the Probate Court was without jurisdiction of the case. *Cooper* v. *Reynolds*, 10 Wall. 308, 315; *Gunn* v. *Plant*, 94 U. S. 664, 669; *Hall* v. *Law*, 102 U. S. 461, 464; *Marchand* v. *Frellsen*, 105 U. S. 423, 428. And in determining the question of jurisdiction, it must be remembered that Probate Courts of California have had for many years the rank of courts of general jurisdiction, and, as said in *Burroughs* v. *DeCouts*, 70 California, 361, 372, their proceedings, 'within the jurisdiction conferred upon them by the law, are to be construed in the same manner and with the like intendments as the proceedings of courts of general jurisdiction, and their judgments have like force and effect as judgments of the District Courts.' Probate Courts being, then, courts of superior jurisdiction, in respect to the settlement, distribution, and partition of estates coming within their cognizance, the recitals in the decree of partition unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support. *Settlemier* v. *Sullivan*, 97 U. S. 444, 449; *Cheely* v. *Clayton*, 110 U. S. 701, 708."

This general proposition is admitted, but the court has treated as jurisdictional, questions which are not in any

sense jurisdictional but which go to the merits of the application to the district court. In other words, the court has treated the character of the evidence presented in support of the application to the district court as a jurisdictional question.

This court has said in the case of *United States* v. *Arredondo* (6 Pet. 691, 709):

"The power to hear and determine a case is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction."

And this case is followed and similar language used in the case of *Rhode Island* v. *Massachusetts* (12 Pet. 657, 718), while in *Ex-parte Watkins* (7 Pet. 568, 572) this court in an opinion by Mr. Justice Story has said:

"But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it; but upon its right to hear and decide it at all."

Upon an allegation that the claimant, Charles Gagnon, had been naturalized in the district court in and for the County of Richardson, Territory of Nebraska, and that the judgment of naturalization had not been recorded, or if recorded, that the record had been lost or destroyed, what court would have jurisdiction to hear and determine the question of supplying the record? Surely, no court other than the court where the proceedings originally took place or the successor to its jurisdiction, which in this case is the district court of the first judicial district of Nebraska (Finding IV, p. 3).

This being so, if the record was improperly supplied it was not a matter of usurpation of jurisdiction but error. The Court of Claims has no jurisdiction to correct error

of a State court, and least of all to correct it upon evidence *aliunde*.

Record Imports Verity.

The record of the naturalization of the claimant in the district court for the first judicial district of the Territory of Nebraska in and for the County of Richardson, on the 25th day of September, 1863 (page 4 of record), certified by the clerk of the district court of the first judicial district of the State of Nebraska, successor to the territorial court, imports verity. That court is sole custodian of its own records. The record, no matter when made, or no matter after what distance of years it was supplied, imports absolute verity and is binding upon all other courts within the United States.

The absolutely binding character of a judicial record and the extent to which it imports absolute verity are principles elementary in the law.

That there should be no question as to the verity which should attach to judicial records of the several States, the framers of our Government provided in the Constitution that —

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." (Article IV, section 1.)

And pursuant to the authority conferred on Congress by the last sentence Congress on May 26, 1790, and March 27, 1804, enacted the provisions of law which will be found in Section 905 of the Revised Statutes, quoted *supra*, p. 8.

That said records and judicial proceedings, authenticated as therein provided, "shall have such faith and credit

given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The Court of Claims does not deny this general principle; but it insists in response thereto that the record upon which reliance is placed was not actually made up until the year 1897, thirty-three years after the date of the proceedings shown by the record.

The testimony upon which the District Court for the first judicial district of the State in March, 1897, based its order restoring the record was not before the Court of Claims and is not before this court. Yet that court undertook to say that simply because of the fact that there was no record or memorandum, or other paper of any kind among the records of that court, when it restored this record, deprived the restored record of all faith or credit; and that the fact that the judge and clerk were both dead at the time the application for restoration of the record was made, and the fact that the records for 1863 were assumed to be complete (whereas the findings show them incomplete) show that the action of the District Court in restoring the record was improperly taken. All this is irrelevant matter.

The claimant in the utmost good faith gave notice (foot of p. 5) to the Attorney-General of the time of his proposed application to the District Court for a restoration of the record, stating his intention to use the restored record, should it be restored, as evidence. After considering, as the order recites, "competent evidence," the court found that the application was made at September term, 1863; the proceedings regularly taken at that time, and the order made for the admission of the claimant to citizenship. It therefore ordered that application and the order of the court admitting the claimant to citizenship to be duly recorded.

Authorities on Power to Supply Record.

Whether it be a question of the power of the court to supply a record of proceedings unrecorded by the clerk, or to supply a lost record, the authorities are equally clear.

The leading case in this court on the subject of supplying the record of a fact not properly recorded is that of *In re Wight*, 134 U. S. 136. In that case, which was a criminal case, a party had been sentenced by a District Court of the United States upon an indictment which, so far as the record showed, was pending in the Circuit Court. Upon application made by him for a writ of *habeas corpus*, the Circuit Court, at a subsequent term, ordered that an order made previously to the trial remanding the indictment into the District Court for trial, but which had failed to be recorded by the clerk, be entered of record.

This court said (p. 143):

"Our first impression was that whatever might be the powers of the courts in this regard over their records during the term in which the transactions are supposed to have occurred, the record of which, or failure to make any record of which, is the subject of amendment, yet when it was attempted to do this after an adjournment and at a subsequent term of the court, the powers of the court in making such changes in the records of the proceedings were limited to those in which there remained written memoranda of some kind in the case, and among the files of the court, by which the record could be amended, if erroneous, or the proper entry could be supplied, if one had been omitted. And especially that in criminal procedure this power to make such entries, at a subsequent term of the court, of what had transpired at a former term, as would establish the authority of the court to pass a sentence of fine or imprisonment, either did not exist at all, or, if it did, was limited to cases in

which some written evidence of what was done remained in the papers connected with the case.

"We are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist."

In the case of *Gonzales* v. *Cunningham*, 164 U. S. 612, 623, in an opinion by the Chief Justice, this court sustained the action of the court below which directed entry of a *nunc pro tunc* record of the arraignment and pleas of defendant, holding that such entries were good, citing *In re Wight*, 134 U. S. 156, and *United States* v. *Vigil*, 10 Wall. 423. In the last case mentioned the act of Congress governing the case gave the right of appeal to either party if asked for within one year from the rendition of the judgment. A judgment against the United States was rendered at the January term, 1867, from which an appeal was sought to be taken. It was maintained on the part of the Government that the appeal had been prayed for by the district attorney in court at the time when the judgment was rendered and was granted, but the clerk, for some unexplained reason, neglected to make an entry of what was done. This was not discovered until the January term, 1869, after the district attorney had retired from office and he said that he had not only prayed for the appeal but charged the clerk to make the entry, and, as he believed, gave him a memorandum to that effect. The new district attorney made an application to the court to supply the record *nunc pro tunc*, which was granted, and the case came up to this court on the appeal. A motion was made to dismiss the appeal and denied by this court.

"The power to correct mistakes in its record, occasioned by oversight, which are of such nature that the record does not show what was in fact done or decided, is a power which is inherent in all courts of superior jurisdiction,

and is frequently exercised in furtherance of justice." (Decision of Circuit Court of Appeals in *Lincoln Nat'l Bank* v. *Perry*, 66 Fed. Rep. 887, 888.)

In *Blythe* v. *Hinckley* the court held that it was not the duty of counsel to see that proceedings in court are properly of record in the minutes. "This duty belongs to the officers of the court, and their default can not be used to the prejudice of parties relying upon the integrity of official records." (84 Fed. 228, 244.)

"Courts possess the inherent authority to enter judgments *nunc pro tunc*, and time will not bar its exercise." (*Fuller* v. *Stebbins*, 49 Iowa, 377.)

In *Kaufman* v. *Shain*, 111 Cal. 16, 19, the court said:

"Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records. The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions; and, whenever it is properly brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. (*Matter of Wight*, 134 U. S. 136; *Balch* v. *Shaw*, 7 Cush. 282; *Fay* v. *Wenzell*, 8 Cush. 315; *Frink* v. *Frink*, 43 N. H. 508; 80 Am. Dec. 189; *Crim* v. *Kessing*, 89 Cal. 486; 23 Am. St. Rep. 491.)"

In *Balch* v. *Shaw*, 7 Cush. 282, 284, was brought in question the validity of a *nunc pro tunc* entry made in 1838, of an order passed in 1824. The court says:

"The case turns, therefore, upon the question whether the record was rightfully amended, so that the tenant can maintain his title on that record.

"There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary

authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*."

In *Frink* v. *Frink*, 43 N. H. 508, 514, in passing upon the legality of a *nunc pro tunc* entry, the court says:

"Every court exercising a continuing jurisdiction—having an office for the preservation of its records, and the charge of those records by a proper officer—has, by law, an implied authority to amend its records, to make them conform to the facts and truth of the case; *Remick* v. *Butterfield*, 31 N. H. 85; *Dudley* v. *Butler*, 10 N. H. 284; 24 N. H. 344; *Claggett* v. *Simes*, 21 N. H. 43; or, as the same doctrine is well expressed by Fletcher, J., in *Balch v. Shaw*, 7 Cush. 284, there can be no doubt that it is competent for a court of record, under its general inherent and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case."

In *Borrego* v. *Territory*, 8 New Mex. 446, 491; 46 Pac. Rep. 349, 362, it was expressly held that courts have power to cause *nunc pro tunc* entries to be made at any time after the term. The court says:

"There is diversity of opinion as to the source of the power to make *nunc pro tunc* entries, but there is none as to the existence of the power to make the records now as of then conform to and speak the actual truth of past transactions, where, by the neglect or inadvertence of the clerk, an omission has occurred, or a false entry has been made. Mr. Elliott is of the opinion that the power did not arise from the statute of Henry VI., but is inherent. 1 Elliott, Gen. Prac. sec. 192. Other authorities, we think correctly, take the same ground. *Balch* v. *Shaw*, 7 Cush. 284; *Fuller* v. *Stebbins*, 49 Iowa, 376; *Orim* v. *Kessing*, 89 Cal. 478, 26 Pac. Rep. 1074; Works, Courts, p. 171."

In *State* v. *Major*, 38 La. Ann. 642, 643, it is stated:

"The defendant next complains of an order of the judge on motion of the district attorney, directing the clerk to amend the minutes of the court after the order of appeal had been granted.

"In the light of our jurisprudence, the mere statement of the complaint is its best answer.

"The minutes of his court are absolutely under the control of the judge, and corrections of the same, so as to make them conform with the facts as they occurred, is not only permissible but it is imperative when the attention of the court is called thereto. *State* v. *Mason*, 32 Ann. 1018; *State* v. *Teissier*, 32 Ann. 1227; *State* v. *Cox*, 33 Ann. 1056."

In *Hershy* v. *Baer*, 45 Ark. 240, 242, speaking of the right of the circuit court to make a *nunc pro tunc* amendment of a record, the court says:

"The power of a circuit court to amend its record so as to cause it to speak the truth is one inherent in the idea of justice itself."

In *State* v. *King*, 27 N. C. (5 Iredell) 203, 204, the court says in an opinion by Chief Justice Ruffin:

"This court has so frequently had occasion to declare, that the power resides in every court to amend the entry on its minutes, or the record of its orders and judgments, *nunc pro tunc*, and that no other court could incidentally question the verity of the record as amended, that we supposed the point would be no more made. We must take the record as it is, because duly certified to us, and we are not at liberty to enquire, how it came to be as it is."

In the case of *Parsons* v. *McBride*, 49 N. C. (4 Jones Law.) 99, it is shown that a motion was made at the Fall Term, 1856, to supply a record for the partition and appropriation of certain real estate made at August Term, 1820, which "had been lost from among the records of the

said court. A copy of this paper was produced and proved to the satisfaction of the court, whereupon, the court allowed the amendment." From the action of the court in allowing the amendment an appeal was taken, and the court in passing upon this question, says:

"So many decisions have been made by this Court affirming the power of every Court to amend its own records, so as to make them conformable to the truth, that we had hoped that the question was at rest. The more recent cases are the following: *Clayton* v. *Liverman*, 7 Ire. Rep. 92, made in 1846; *Bradhurst* v. *Pearson*, 10 Ire. Rep. 55, made in 1849. In this case it is said, 'It has been repeatedly decided that every Court has the power to amend its own records, so as to make them speak the truth, and that we have no right to interfere with the use of their discretionary power.'"

In *Perry* v. *Adams*, 83 N. C. 266, 267, the court says:

"It is not only the right but the duty of the court, as its records import absolute verity, to so correct and amend them as to make them speak the truth, and be a transcript of whatever occurred that properly belongs to its record."

And the court further says:

"But it is equally plain that the amendment, whether made or refused, is not the subject of appeal. The court, whose records are to be affected is alone the judge of the facts and of the propriety of the amendment." (83 N. C. 268.)

In *Taylor* v. *McElrath*, 35 Ala. 330, it appears that on December 13, 1858, William McElrath moved the Probate Court to supply certain lost papers alleged to belong to the former Orphans' Court of the county. The lost record consisted of proceedings had in the Orphans' Court at its May Term, 1838. The Probate Court rendered a decree, which after stating the facts, continued as follows:

"And now comes into court the said William McElrath, by his attorneys, and in his own *proper person*, and propounds to the court a petition, order, writ of *ad quod damnum*, and order authorizing the erection of said mill-dam,—alleging that the same are, in fact and substance, copies of the original papers in said original cause; and also offered proof to establish the same by the affidavits of John S. Wilson and Benjamin D. Cook."

It further shows that the application was resisted and counter-testimony taken. The court, being convinced, ordered the various copies of papers be substituted for those lost.

The errors assigned on appeal were:

"1st, that the probate court had no jurisdiction of the case; 2d, that there was no record evidence to amend by, or to authorize the substitution; and, 3d, that there was not sufficient certainty in the proof to authorize the substitution." (p. 332.)

The Supreme Court in its opinion says:

"It is indispensable to the successful administration of justice, that every court should have the power of supplying its lost records. The decisions of this court fully recognize the existence of inherent power in courts of record, to substitute copies of lost records, even after judgment rendered.—*Williams* v. *Powell*, 9 Porter, 493; *Wilkerson* v. *Branham*, 5 Ala. 608; *McLendon* v. *Jones*, 8 Ala. 298; *Doswell* v. *Stewart*, 11 Ala. 629. The probate court is a continuation of the old orphans' court, with some modifications, and must have the power of supplying the lost records of that court."

In *Souvais* v. *Leavitt*, 53 Mich. 577, 579, the Supreme Court of Michigan, in an opinion by Chief Justice Cooley, held:

"The right of the judge to order the errors in the records of his court to be corrected is undoubted."

In *Van Etten* v. *Test*, 49 Neb. 725, 726, 727 (a case in the same State in which the proceedings concerned in the present case took place), the act of entering a judgment *nunc pro tunc* was sustained, the court saying:

"The authority of courts, both of law and equity, to enter a judgment or decree *nunc pro tunc* in a proper case and in furtherance of justice is one that does not depend upon statute; it is an inherent power lodged in the courts; and this power rests upon the principle that the courts have the authority, and it is their duty, to make their records say what actually occurred,—to speak the truth. If a judgment in fact was rendered, if an order in fact was made, and such judgment or such order not recorded, then that court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render *nunc pro tunc* such judgment or make such order."

May Be At Any Time.

We have already seen that in the case of *In re Wight* (134 U. S. 136) this court in a criminal case sanctioned an order supplying the record at a subsequent term. If such an amendment can be made at one term later no limit can be drawn upon the exercise of the power.

In *United States* v. *Vigil*, 10 Wall. 423, a record supplied after two years was held good.

We have seen in *Balch* v. *Shaw*, 7 Cushing, 282, 284, the Supreme Court of Massachusetts sustained a correction of a record made fourteen years after the time the proceedings took place.

So, too, in New Hampshire, referring to the right to enter *nunc pro tunc* records, the court in *Frink* v. *Frink* says:

"This may be done at any time, as well after as during the term. The length of time, in this case (12 years), between the granting of the license and the making up

of the record, does not take away the right or jurisdiction of the court." (43 N. H. 508, 514.)

In *Whiting* v. *Equitable Life, etc.* 60 Fed. Rep. 197, 200, the Circuit Court of Appeals says:

"Even subsequent to the adjournment of the term the court could, upon application, correct the record so as to show the truth of what actually occurred, and repair any error or omission of its officers, upon proper application being made."

"Time will not bar its exercise." (*Fuller* v. *Stebbins*, 49 Iowa, 377.)

"In *People* v. *County Court*, 9 Col. App. 41, 47; 47 Pac. Rep. 471, the court said:

"We are brought to the main question of the power of the court to amend its records after the term. Of this there is no doubt. The courts everywhere concede authority to make their records conform to the facts. The only possible limitation on the power of the courts in this direction is found in the general expression that after the term they are limited to the correction of those errors which may be regarded as of a clerical character, and which, when corrected, will make the records conform to the facts."

In the case of the *Inhabitants of Limerick*, 18 Maine, 187, the court says that if "the recording officer has erred in making up a proper or full record, the Court may in its discretion cause the record at any time to be amended or corrected so as to have it declare the whole truth."

In *Odell* v. *Reynolds*, 70 Fed. Rep. 656, 659, the Circuit Court of Appeals, 6th Circuit, says:

"It must be admitted that, by the expiration of the term, the court had no longer any power or authority to alter the judgment actually rendered at the former term in any essential particular. But it is too much to say

that the court had not the power to correct it so as to make it conform to the fact; that is to say, to the actual proceedings in court and the judgment directed to be entered thereon. On the contrary, it is a power inherent in the authority of every court having general jurisdiction to correct errors in the making up of its records whereby they fail to express the truth in regard to its proceedings. And this power may be exercised by the court at any time when the error is brought to its attention, and no injury is likely to happen to the parties or other persons by its exercise. No doubt such power should be cautiously and discreetly used, but that it exists is well established by authority."

In *Rugg* v. *Parker* (7 Gray, 172, *post*, p. 31) a record was made *nunc pro tunc* after 20 years; in *Laurence* v. *Richmond* (1 J. & W. 241), after 23 years; in *Taylor* v. *McElrath* (35 Ala. 330, *supra*, p. 25), after 20 years; in *Parsons* v. *McBride* (49 N. C. (4 Jones Law) 99, *supra*, p. 24), after 36 years.

May Be Upon Any Evidence.

The view taken by the Court of Claims that simply because the judge and the clerk of the court were dead, the court had no jurisdiction to correct its own records upon the testimony of other witnesses can not for a moment be sustained. The record as restored (p. 4) shows the presence of the sheriff also, and it was not found that he was dead at the time the record was restored, much less that all the inferior officers of the court and all attorneys and bystanders were dead. The court had as much right to resort to the recollection of these witnesses as to its own recollection.

From the statement of the case of *United States* v. *Vigil* 10 Wall. 432, heretofore referred to (*supra*, p. 21), it is evident that the record which was restored was upon parol evidence; that no record existed in the court.

The district attorney said that the appeal was prayed in open court at the time of the judgment and that he charged the clerk to make a memorandum of it and as he believed, gave him a memorandum to that effect. But it is not shown that the memorandum existed in the court, and the necessary inference is that it did not exist, yet this court held the record so restored was good.

In *Parsons* v. *McBride*, 49 N. C. (4 Jones Law, 99), copies of papers from outside the court records were "proved to the satisfaction of the court" and admitted by amendment, and this after more than 36 years.

In *Taylor* v. *McElrath*, 35 Ala. 330, copies were produced from outside of the court and proved by parol and substituted by order of court after 20 years.

In *Cleghorn* v. *Johnson*, 69 Ga. 369, 372, the court says:

"The authority of courts to establish lost office papers and amend their records, on motion, by any competent evidence, intrinsic and extrinsic, has too often been recognized by this court to be now questioned."

In *Balch* v. *Shaw*, 7 Cush. 282, 284:

"The court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive, until altered or set aside by the same or some other court having jurisdiction, but it can not be drawn in question collaterally when such record is used or relied upon in support of a title."

And in *Frink* v. *Frink*, 43 N. H. 508, 515, the court says:

"We think it clear, upon the authorities, that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the

amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceedings before it; what was the proper entry to be made on the docket, and how the record should be extended."

In the case of *Rugg* v. *Parker*, 7 Gray, 172, a petition was presented to the court of common pleas at the September Term, 1855, to order the clerk to complete the record of a judgment rendered by that court at the December Term, 1835, the record of which judgment had remained incomplete because, in consequence of the utter insolvency of the defendant, the plaintiff had failed to furnish the clerk with the papers necessary for entering the judgment and complete the record thereof. The petitioner presented two promissory notes purporting to be the notes sued on, and called as a witness the attorney who made the writ, and took some other testimony upon the reason for the delay in furnishing the papers. The court ordered the record to be completed as prayed for, to which order exceptions were taken. In passing upon this the Supreme Court of Massachusetts says:

"The court of common pleas undoubtedly had authority to complete their records, in the action on the notes. *Balch v. Shaw*, 7 Cush. 282. * * * Whether the court would order the completion of those records was a matter of judicial discretion; and the action of the court, within the limits of its authority, is not a subject of exception. But if these exceptions were properly before us, we should overrule them; being of opinion that they do not show that the order was wrongly made."

In *Parker* v. *Rugg* this judgment so obtained and recently entered up was allowed to be set off in an action commenced many years after that judgment and before the completion of the record. (9 Gray, 209.)

The court in *Inhabitants of Limerick*, 18 Me. 187, says:

"Each court must necessarily be the judge of what it has decided and adjudged and when it orders an amendment of the record the presumption of other courts must necessarily be, that it does not undertake to order its clerk to record what it never had decided."

In *Sprague* v. *Litherberry*, 4 McL. 442, 449; 22 Fed. Cases, No. 13,251, there was brought in question the validity of a *nunc pro tunc* entry made upon affidavit four years afterward, showing appointment of guardian. Court held record good, saying:

"Has a court the power to enquire into the jurisdiction of the court whose record is offered in evidence? This power is necessarily exercised by all courts. But in making such an inquiry, the court must be careful to discriminate between what constitutes jurisdiction and error. Where a court, from its general powers, has jurisdiction of the subject-matter, a due notice served on the party, if the proceedings be *in personam*, or an attachment laid on the land, if the proceedings be *in rem*, gives jurisdiction; and after this attached, no proceeding in subsequent stages of the case, however erroneous, will make them void. *Bank United States* v. *Voorhees*, 10 Peters; 1 McLean, 224."

Conclusion.

Nearly all the authorities cited in the opinion of the Court of Claims are in cases where the application was for an amendment of a pleading, or judgment, or some other action already taken in court; in other words, they were not attempts to supply a record of that which had already been done or had been recorded imperfectly or not at all, but to do something different from what had already been done.

In Indiana a somewhat stricter rule seems to prevail than in other States, as shown in the cases cited (Record, p. 10). In the last-named of these cases, *Schoonover* v. *Reed*, 65 Ind. 313, 316, the court admits that its rulings are in conflict with those in other States, saying:

"In some courts in other States such entries are allowed simply upon parol evidence. But, as it seems to be the settled law of this State that a *nunc pro tunc* entry of an order or judgment of a court can not be made upon such evidence alone, we think it the better course to adhere to the law as thus settled."

It would also now probably admit that its ruling is in conflict with that of this court *In re Wight*, 134 U. S. 136, and other cases above cited.

It is true that it is suggested in the opinion (p. 13) that there has usually been shown to be a cause pending on which to found an order restoring the record. But none of the cases make any distinction of this sort, or limit the power to those in which there is a pending cause. As pointed out by this court in *United States* v. *Hill*, 120 U. S. 169, a proceeding for naturalization is not a "cause" in the strict sense of the term. It is (p. 177) one of those "special and peculiar cases of which the courts have jurisdiction, where only the party asking for the right or privilege is before the court."

And, again (p. 178):

"The papers are usually prepared by the parties themselves or their friends, or more frequently by agents of candidates. The hearings are *ex parte*, at no stated times, and it is rare that any person appears in opposition."

And it is held that the preparation of papers in these cases is so entirely outside of the duties of the clerk that when he renders services in these cases beyond the mere entry of the matter on the journal, he acts not strictly as clerk, but rather as a person specially appointed to assist the court. Hence in a special proceeding like this, where there is no cause pending, where there are not, or at least need not be, any papers filed, and the entry on the journal constitutes the whole proceeding, a denial of a power to

restore a lost entry on the journal would be in effect to deny all power to restore such proceedings in any case.

This court in an opinion by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 207, says:

"The judgment of the circuit court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We can not usurp that power by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied."

This is directly applicable in the case at bar. The judgment of the District Court informed the Court of Claims that the naturalization in fact took place and required no inspection of the application for naturalization upon which it was founded. The law trusts the District Court with the whole subject; with jurisdiction over naturalization matters and over its own records, and has not confided to the Court of Claims the power to revise its decisions.

Even if this court could look at this controversy as an original matter, which could be inquired into on its merits, it is hard to see why the decision of the Court of Claims should be accepted. As Charles Gagnon made the allegation that he had been naturalized before the District Court of the first judicial district of Nebraska on the 25th day of September, 1863, and that no record thereof could be found, he was entitled to have a judicial determination of the truth of his allegation. There can be no good reason assigned why he should have applied to any court other than the court which succeeded to the jurisdiction of the said district court to inquire into this matter. Had he attempted to prove his allegation in the Court of

Claims, he would have been turned away, and rightly, with the statement that he must apply to the court in which the proceeding took place or to its successor. The decision of that court, which was in a position to inspect the records of the District Court and ascertain their condition and which was able to have witnesses appear before it for the purpose of giving their testimony in the presence of the court, is entitled to more weight than the decision of the Court of Claims attacking the action of the local court upon a statement of a special attorney of the Department of Justice, which the parties consented to have read as evidence at the trial of the case.

The record of the admission of the appellant, Charles Gagnon, to be a citizen of the United States in 1863, should, therefore, have been accepted by the Court of Claims as conclusive. It shows that he was a citizen in 1866, when the depredation was committed.

The judgment should, therefore, be reversed, and the cause remanded with directions to the Court of Claims to enter judgment in favor of the claimant.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES GAGNON, *Appellant*,
v.
THE UNITED STATES and THE SIOUX AND CHEYENNE INDIANS. } No. 163.

BRIEF IN REPLY.

Order not Under Rev. Stat. U. S. §§ 899, 900.

The brief for the United States is in error in the suggestion (pp. 1–3) that the proceedings taken in the District Court for Richardson County, Nebraska, for the restoration of the record of naturalization were based upon Sections 899 and 900 of the Revised Statutes of the United States. These sections relate only to courts of the United States and have no application to State courts.

Richardson County Court Held in 1863.

In order to controvert the validity of the order of the State court restoring its own records, counsel for the United States are driven to deny that there was a term of court held in the year 1863. But no evidence of this is offered beyond their own statement to that effect. No such fact is stated in Finding V, upon which a labored argument (pp. 6–11) is based, to show that no term of the Richardson County Court was held in that year.

This speculation as to what the records of the district

court show indicates more clearly than anything else the impropriety and danger of permitting the Court of Claims in a proceeding purely collateral, upon evidence *aliunde*, to pass upon the legality of the action of the district court, in a matter so *peculiarly within the jurisdiction* of the court controlling its own records. The Court of Claims proceeded upon the theory that Finding V showed the records of the district court were complete and intact for 1863 (Rec. p. 7). The journal for that year is not shown by such finding to be in the court. The most that counsel for the United States even claim for the probative force of that finding is that there is a "reasonable presumption" that the journal is in court and that the real "significance" of the finding is that there was no term held in 1863. Of course, even *reasonable* presumptions can not controvert facts of record appearing in Finding IV (p. 3). The proposition that there is nothing to amend by is fully met by the consideration that under the law in force in 1863 (quoted on page 10, appellant's brief) no written papers were required, other than the record of the proceedings which it was the duty of the clerk to make. To say that the court has no power in such a case to make the records kept by the clerk speak the truth, is to make the clerk more powerful than the court itself. For what the clerk fails to record can not be recorded and what he erroneously enters up can not be changed and this notwithstanding the action of the court may have been entirely different.

The only safe rule is that every court has the exclusive control over its own records and what it orders recorded must stand as verity unless revised for error in a proper proceeding. Endless confusion would result from any doctrine which would permit one court to refuse to accept a judicial record because convinced by

evidence *aliunde* that the action of the first court should not have been taken.

Citations for United States Examined.

There is not a case cited wherein a restored record has been set aside in a collateral proceeding.

The cases cited for the United States do not sustain the proposition that a court has no power to order its clerk to record that which was done by the court but not recorded by the clerk, or if recorded the record of which has been lost, at any time and upon any competent evidence satisfactory to that court.

State ex rel v. *Primm*, 61 Mo. 166, cited p. 18; *Culver* v. *Cougle*, 165 Ill. 417, cited p. 17; *Coughran* v. *Gutcheus*, 18 Ill. 390, cited p. 4, decide that existing judicial records can not be contradicted by parol evidence at a subsequent term.

Albers v. *Whitney*, Story, 310, cited p. 16; *Russel* v. *McDougal*, 3 S. & M. (Miss.) 234, cited p. 16; *Moody* v. *Grant*, 41 Miss. 565, cited p. 17; *Shackleford* v. *Levy*, 63 Miss. 128, cited p. 15, involve the correction of errors of the court in judgments actually rendered, not errors of the clerk in recording them.

Burney v. *Boyett*, 1 How. (Miss.) 39, cited p. 15, is wholly irrelevant, involving the question of which of three judgments rendered the same day is entitled to priority in matter of satisfaction.

The extract from *Boyd* v. *Blaisdell*, 15 Ind. 73, cited p. 17 and quoted as the action of this court, p. 18, is, as the court says, an "observation or two" to draw attention of the profession to the power of the courts to make alterations in records. It is not law but *dictum* and even this relates to "altering a judgment" and does not attempt to say that errors of clerks can not be corrected by the court.

Makepeace v. *Lukens*, 27 Ind. 435, cited p. 13, and *Mitchell*

v. *Lincoln*, 78 Ind. 531, cited p. 14, are Indiana decisions, which, as we pointed out on page 32 of our brief, are admitted by the Supreme Court of that State to be in conflict with decisions in other States.

Lynch v. *Reynolds*, 6 Bush (Ky.) 547, cited on pages 11 and 14, is one case squarely in point, but it rests upon a single precedent, *Vandever* v. *Griffith*, 2 Metc. (Ky.) 425, in which was involved the validity of a *nunc pro tunc* filing of a bill of exceptions which had not been filed at the preceding term.

The quotation from *Balinski* v. *State*, 3 Minn. 427, on page 14, expressly admits the power of the court to amend a record after the term. If the opinion is examined it will be found to be a strong authority for appellant.

A Circuit Court Decision by Justice Grier.

Cromwell v. *Bank of Pittsburg*, 2 Wallace Junior (not Wallace as cited by counsel for the United States, p. 16 of his brief) 569, 586, is also a strong authority for appellant. It is also reported 6 Federal Cases, No. 3409.

The entire paragraph is not quoted in brief for the United States and the words italicized are not italicized in the opinion. They are merely incidental and not the controlling language as would appear from appellee's statement. The entire paragraph should be read. After the words quoted by appellee it continues as follows:

"It is a power vested in every court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and officers. It is a power committed to the discretion of the court, to be exercised over their own records, and the correct use of that discretion can not be questioned by another court, even on a writ of error. The jurisdiction of the court does not depend on the consent or presence of the parties to the suit, but on the power of

the court over its own records. A record is received as absolute verity, and it is the duty of the court to see that it speaks the truth and the whole truth. If the amendment made is according to the truth, the parties have no right to complain. If it be alleged that the amendment was ordered on a false suggestion, the party making such allegation should apply to the court to vacate or set aside such order for that reason. The court of common pleas of Allegheny county having decided that a judgment was confessed by Cromwell on the 13th of September, 1820, and that it should have been entered by the clerk on the docket, and having ordered that omission to be amended nunc pro tunc, it is conclusive evidence to this court that such a judgment was rendered or confessed on the 13th of September, 1820. The complainants in this case can not question its propriety or deny its effects."

It appears from the facts stated in the opinion that the practice was for the clerk to make a record of judgments in a rough docket and then to transfer the entry to the large and more permanent one. The first mentioned docket could not be found and the second mentioned docket contained no record of the judgment. Yet the court held from a paper found in the court and from the entry of a *levari facias* that there was a conclusive presumption that there had been an entry in the rough docket, which had been lost and which the prothonotary had neglected to afterwards copy into the folio docket, and the court goes on to say:

"If after such a length of time titles could be called in question for want of mere writ, docket or other memorandum, no man's property in Pennsylvania would be safe; and more especially would this be the case in Pittsburg where processes of execution on which valuable titles depend, is often found among the papers of deceased attorneys and sheriffs, who have sometimes moved to near or to distant places and states, and where the archives of the court are treated as useless lumber."

So far from this case deciding that no amendment can be made unless there is some memorandum in the court to amend by it is fair to presume that if the case had required a decision on this point the court would have reached a conclusion similar to the conclusion reached by this court in the matter of *Wight* and by other courts in the numerous other cases cited by appellant on pages 29 to 32 of his brief.

Conclusion.

The question in this case is a simple one. The District Court of Richardson County, Nebraska, has certified that there remains in that court a record of the naturalization of Charles Gagnon, the claimant in this case, on September 25, 1863. The Government attempts to impeach that record by showing that it was not actually made up until some years after the occurrence of the proceedings therein recited. Can the record of the proceedings of the State Court be thus impeached for the reasons hereinbefore set forth? It is submitted that it can not, and that in whatever form it has been prepared, or at whatever time it has been made up, it is conclusive.

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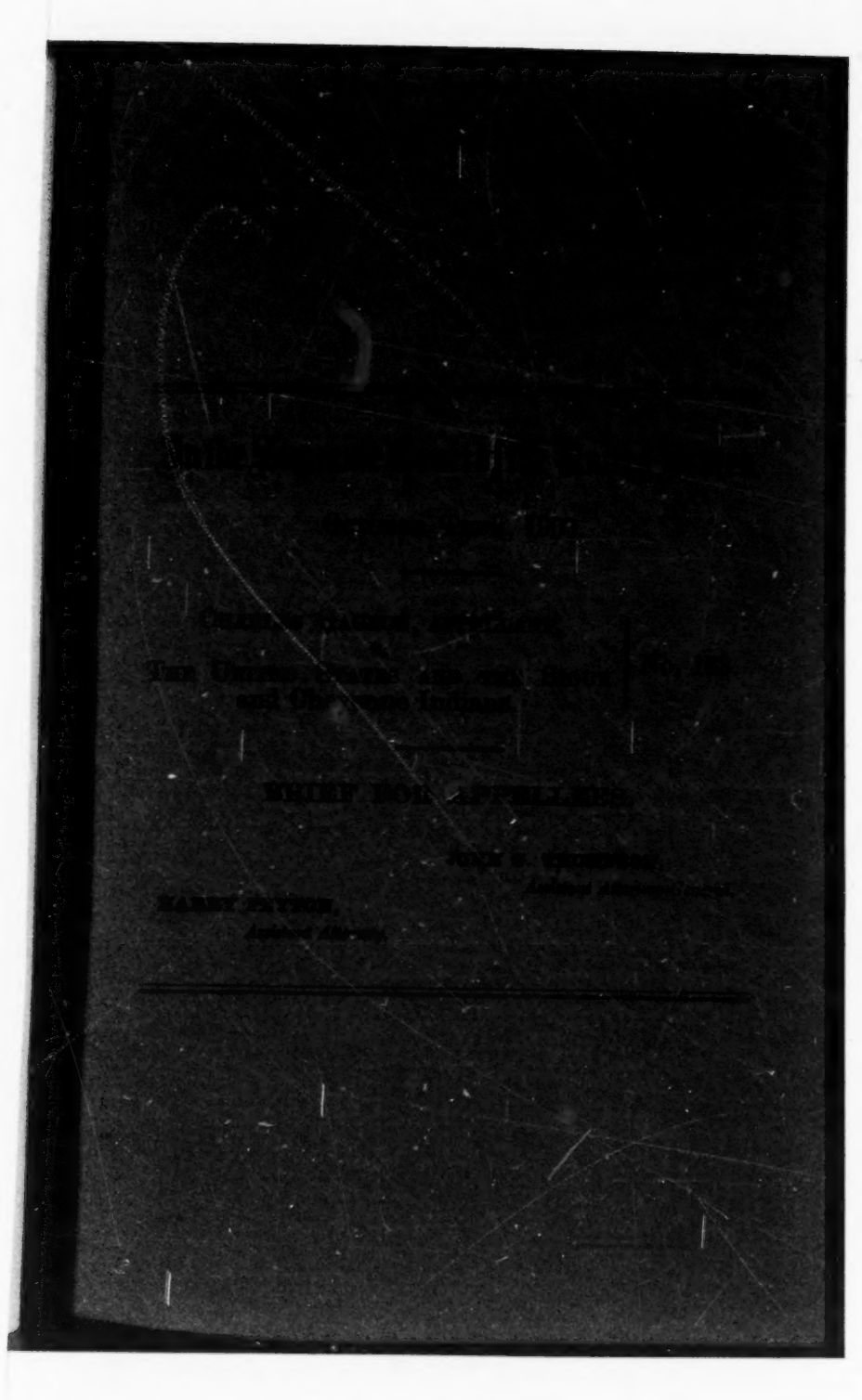

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES GAGNON, APPELLANT,
v.
THE UNITED STATES AND THE SIOUX and Cheyenne Indians. } No. 163.

BRIEF FOR THE APPELLEES.

I. STATEMENT OF THE CASE.

This was a case instituted in the Court of Claims under the Indian depredation act of March 3, 1891, for the recovery of $15,500, for property taken from the firm of Hosford & Gagnon. The third paragraph of the petition (R., p. 1) alleges that both members of the firm were at the date of the depredation citizens of the United States. The date of the alleged depredation was February 17, 1866.

On the 19th of March, 1897, counsel for the claimant gave notice to the Attorney-General that they proposed to make application to the district court of Richardson County, Nebr., on the 29th of March, 1897, on behalf of Charles Gagon, *for the restoration of certain lost records* relative to the naturalization of the said Gagnon (R., p. 5). Presumably this notice was intended as a basis for an

order of the court under sections 899 and 900 of the Revised Statutes, which are as follows:

> SEC. 899. When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original would have had.
>
> SEC. 900. When any such record is lost or destroyed, and the defect can not be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record can not be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will

> be heard; and if upon such hearing the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not been lost or destroyed.

It will be noted that the right to invoke this remedy exists "when the record of any judgment, decree, or other proceeding of any court of the United States *is lost or destroyed.*" As to notice, section 900 provides:

> * * * The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with a written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard. * * *

The notice hereinbefore mentioned (p. 5, R.) evidently contemplated this statutory proceeding; but a discovery of the existence of the records of the district court of Richardson County, Nebr., as disclosed by Finding V (p. 6, R.), unquestionably diverted the purpose of the appellant, and the order, instead of restoring a record lost or destroyed, was taken as an order *nunc pro tunc* to

make a decree of naturalization as an amendment *nunc pro tunc* to the records that were in existence at that time, but which records failed not only to show a decree of naturalization but failed to contain any memoranda, memorial paper, or other writing showing that anything was done at that term of the court toward the naturalization of the claimant.

It is to this order or decree *nunc pro tunc*, which was rendered upon oral testimony alone, without any memorial paper or written memoranda being before the court of what transpired some thirty-three years previous to the making of this order, that the defendants in the court below objected and which the Court of Claims declined to accept in establishment of its jurisdiction.

II. QUESTION INVOLVED.

The question involved in this case is one jurisdictional to the Court of Claims, i. e., the citizenship of the present claimant, Charles Gagnon, who sues in his own right for one-half of the property alleged to have been taken, as appears by the petition (R., p. 1). The Court of Claims, under the findings of fact set forth on pages 2, 3, 4, 5, 6, and 7 of the record, held as a conclusion of law that the claimant, Charles Gagnon, was not a citizen of the United States on the date of the said depredation, on the 17th of February, 1866, and upon this jurisdictional ground dismissed the petition. From this judgment of the court the claimant in the court below appeals.

The appellees do not controvert many of the elementary contentions presented by the appellant on his brief. They concede the general powers of the court to enter judgments *nunc pro tunc*, the right to enter such orders *nunc pro tunc* at any time, even after the lapse of many years. They do not controvert the proposition that verity should attach to the judicial records of the several states and that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, as directed by article 4, section 1, of the Constitution of the United States. These, in appellees view of the case, are not questions involved herein. *The real question is whether or not the judge of the District court of the first judicial district of the State of Nebraska had the power and jurisdiction to enter judgment nunc pro tunc restoring a record of naturalization which the claimant contends should have been entered on the 25th day of September, 1863, when there was no record, memorial paper, or memoranda in existence as a basis for the amendment of the record, to correct which the order of 1897 nunc pro tunc was entered.*

The appellees did not in the court below attack a decree of naturalization, nor do they in this court contend that an original decree of naturalization is not final. Appellant in his discussion of the question confuses the issue. The defendants in the court below insisted that there was no inherent power in the district court in Nebraska in 1897 to enter a *nunc pro tunc* decree amending

the record and restoring a decree of that court rendered in 1863, unless there was some written memoranda, memorial paper, or minute upon the dockets of that court showing the pendency of the original proceeding.

That the records were thus deficient is apparent from the agreed state of facts set forth in Finding V (p. 6, R.).

Appellant (p. 9 of his brief) contends that Finding V does not support the contention of the defendants in the court below that the records of the territorial court of Nebraska for the years 1862, 1863, and 1864 are now complete and intact. He states:

> The appearance docket covering the year 1863 is shown to exist, though it contains blank pages; and the trial docket for this year also exists, as is shown by the references to it. But the one important and material record of the court, the journal for 1863, has not been shown to be in existence.

Finding V (p. 6, R.) is as follows:

> A search of the records of the district court of Richardson County, Nebr., at Falls City, made by a special attorney of the Department of Justice, and admitted as evidence by agreement of the parties, discloses the following facts:
>
> From the organization of the court down to and including the year 1862, the records are complete and include an appearance docket, a trial calendar upon which is docketed every case that was tried, and upon

which also *is* shown the minutes made by the judge at the time the cases were heard. There are also journals of the court in which are spread at length the orders entered in the various cases tried. Subsequent to the year 1863 there are also appearance dockets, trial dockets, and journals, kept in practically the same form as at present, showing the action of the court, as in those prior to 1863. The appearance docket covering the year 1863 is one which was begun prior to that year, and which covers the year 1862. It also covers the year 1864 and several years subsequent thereto. This appearance docket, however, shows but the entry of five cases during the year 1863. The cases at that time were docketed three upon a page, and there are numerous blank pages after the docketing of the last five cases for 1863 before the docketing of the first case in 1864. The first trial docket made up after the year 1862 has upon it each of five cases appearing upon the appearance docket for 1863, and also shows forty-seven other cases docketed during the year 1863, but not appearing upon the appearance docket. Some of these show, however, that they are petitions for new trial, cases appealed from justice court, motions for confirmation of sheriff's sales, transfers of cases from other counties, and other proceedings, which an inspection of the appearance docket shows it evidently was not the custom to place upon the appearance docket. Deducting matters of this nature from the full number

> of cases docketed upon the trial docket which had been filed in 1863 leaves such a number of cases as should have appeared upon the appearance docket as could be docketed upon the pages left blank in the appearance docket between the cases docketed in 1863 and those docketed in 1864.

It is thought that this finding can not be construed as a finding that "the journal of 1863 has not been shown to be in existence."

The agreed facts, which were the result of an investigation of the records by a special attorney of the Department of Justice, showed that the records for the district court of Nebraska down to and including the year 1862 were complete. These records mentioned were the appearance docket, trial docket, and the journal of the court. Subsequent to 1863 there are also appearance dockets, trial dockets, and journals. The only entries appearing in the year 1863 were the entries of five cases on the appearance docket. In this docket, following the entry of the five cases in 1863, there were numerous blank pages, which were followed by the docketing of cases in 1864. The first trial docket made up after the year 1862 has upon it each of the five cases appearing upon the appearance docket for 1863 and also 47 other cases docketed during the year 1863, but not appearing upon the appearance docket. Some of these cases, however, are petitions for new trial, appeals from justice courts, motions for confirmation of sheriff's sales, etc.

The significance of this showing is, not that there is a failure to account for the journal for 1863, *but that there was no term of court held in 1863*, which, if held, would have appeard upon the journal. Counsel for the appellant seem to proceed upon the idea that separate dockets, trial and appearance, and separate journals, in the sense of separate books, were kept for each year. The entries on the trial and appearance dockets run through from 1862 to 1864, including entries on the appearance docket for 1863. The journal for 1862 and the journal for 1864 are in existence (Finding V); and by "journal" is meant the proceedings had daily before the court. When counsel for the appellant say that "the journal for 1863 is not accounted for," they mean to say that while the journals (i. e., the minutes of the things had and done in court) for 1862 and 1864 appear intact, yet the journal for 1863 (i. e., the minutes of the things had and done in court for that year) is not accounted for.

As stated before, the reasonable presumption arising from this state of the record showing journals in due form for 1862 and 1864, and showing the entry on the appearance docket of five cases in 1863, but failing to show any entrances on the trial docket for 1863, is that there was nothing had and done by the court to appear on the journal for 1863. In other words, we have for the year 1863 the evidence of ministerial acts on the part of the clerk by the entry of cases on the appearance

docket, while we have no evidence of judicial acts by the court, nothing appearing on the minutes, which are the records of things had and done by the court during term time; and nothing appearing on the trial docket, which would be the evidence of cases tried at a term of court. This condition of the record indicates, as has been hereinbefore stated, *that there was no term of the district court held* in Richardson County, Nebr., for the year 1863.

Another significant suggestion is offered by the record, viz, unquestionably the claimant, by his notice to the Attorney-General, referred to in the first part of this brief, intended to proceed under sections 899 and 900 of the Revised Statutes for the restoration of a record lost or destroyed. Undoubtedly, upon the presentation of this question to the court, it was discovered that the records supposed to be lost or destroyed (the journal, i. e., book wherein the minutes of the court were entered) was not lost or destroyed, but failed to show the entry of the decree of naturalization. That such journal was not lost or destroyed, but was in existence at the time of the hearing, and failed to show the entry of the decree of naturalization, is evidenced by the rendition of the judgment *nunc pro tunc*, instead of the judgment originally intended to be secured under sections 899 and 900 of the Revised Statutes.

The defendants reiterate their former insistence that Finding V, viewed in these lights, clearly

establishes the fact that a journal, wherein orders of court may have been entered, was in existence in 1863 but failed to evidence the holding of a term of court for that year. It is to the establishment of a record by way of amendment *nunc pro tunc* when there is no evidence of the existence of any such record or the existence of any memoranda or memorial paper showing that any such proceedings were ever instituted or had in the Territorial court, that the defendants objected in the court below and here renew such objection.

The entry of such a decree *nunc pro tunc* where there is no record to amend nor memorial paper or memoranda of what transpired at the time, furnishes the reason for the oft-repeated denials of the courts to permit the rendition of such a judgment *nunc pro tunc*. It is said in the case of *Lynch* v. *Reynolds* (6 Bush. (Ky.), 547):

> The proposition is to supply the whole by the memory of the judge alone of what took place. The accuracy of the memory of the judge as to what he states can not be questioned, but can omissions and failures to enter orders and judgments be thus supplied at a subsequent term? If they can, the records of courts must lose their verity, and the rights of the citizen depend on the varying and fading memories of men. The law forbids such a state of things. This question we regard as virtually settled in *Vandever* v. *Griffith* (2 Metc. (Ky.), 425).

III. POWER OF COURT TO RENDER *NUNC PRO TUNC* ORDERS.

As stated hereinbefore, there is no question but that courts of record have the inherent power to enter judgments *nunc pro tunc* to correct mistakes and supply defects arising from the omissions of the clerk or recording officer, and to have the record conform to the actual facts and truth of each case.

The authorities cited by the appellant on pages 20 to 27 of his brief, upon examination, will be found to apply to *cases pending* in the court wherein the order was made. In other words, in each of these cases referred to there was some record in the case in the court of the pendancy of an action of some kind, whether it rested upon an indictment and other entries of record in a criminal proceeding, as in re *Wight* (134 U. S., 136) or *Gonzales* v. *Cunningham* (164 U. S., 612, 613) or in any of the other cases cited by the appellant.

These cases stand upon an entirely different footing to those hereinafter cited by the appellees, the distinction being that the court, in all the authorities relied upon by the appellant, entered judgments *nunc pro tunc* amending the records of the court, which records showed the pendancy of a suit, or action of some kind. The authorities hereinafter referred to in support of the appellees' contention, show that there must be a basis for an order *nunc pro tunc*, in that there must be something in the record to amend by. Some entry upon the docket

of the court, memoranda, or memorial paper must be shown as a basis for the order *nunc pro tunc*.

In an early case, that of *Hamilton Bank* v. *Dudley*, 2 Pet. (U. S.), 522, Chief Justice Marshall said:

> That a court of record, whose proceedings can be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records * * * is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of us question the existence of the power.

The supreme court of Indiana draws a distinction between orders *nunc pro tunc* to supply an omission in a record and an order *nunc pro tunc* to correct a clerical error of commission. The court says:

> In the case of *nunc pro tunc* entries of something that has been done but not entered in the original cause, it would appear that they can be allowed only where there is some memorial paper or other minute of the transaction in the case from which it can be clearly ascertained and known what actually took place in the original proceeding. (Citing *Makepeace* v. *Lukens*, 27 Ind., 435, and other authorities.)
>
> But in the case of an amendment to correct a clerical error of commission any evidence of the fact of the error is, it would

seem, competent. (Citing *Mitchell* v. *Lincoln*, 78 Ind., 531, and other cases.)

Mitchell v. *Lincoln*, 78 Ind., 531.

In *Balinsky* v. *State*, 3 Minn., 427, the court said:

> While we admit the power to amend a record after the term has passed in which the record was made up, we would deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made.

In the case of *Coughran* v. *Gutcheus* (18 Ill., 390) it is said:

> Where there is nothing to amend by, and the court is compelled to learn from the memory of witnesses what its judgment in fact was, it may well be doubted whether, upon motion and *ex parte* proof, however strong and contradicting the record, an amendment can be made conforming the record of the judgment to such proof. (A number of cases from Alabama, Georgia, Illinois, Iowa, Kentucky, Missouri, New Mexico, North Carolina, and Texas are cited in support of this contention. See Enc. Pleading and Practice, vol. 17, p. 930; also, *Tilghman* v. *Werk*, 39 Fed. Rep., 680.)

In the case of *Lynch* v. *Reynolds* (6 Bush (Ky.), 547) it is said:

> The proposition is to supply the whole by the memory of the judge, alone, of what took place. The accuracy of the memory of the judge as to what he states can not be

> questioned, but can omissions and failures to enter orders and judgments be thus supplied at a subsequent term? If they can, the records of courts must lose their verity, and the rights of the citizen depend on the varying and fading memories of men. The law forbids such a state of things. This question we regard as virtually settled in *Vandever* v. *Griffith* (2 Metc. (Ky.), 425). (Citing other cases in support of the contention.)
>
> Encyl. of Pleading and Practice, vol. 17, p. 930.

This doctrine has been followed in a number of Mississippi cases. In *Shackleford* v. *Levy* (63 Miss., 128) it was stated by Judge Cooper:

> At an early day in the history of this State it was decided by this court that no judgment could be amended after the term in which it had been rendered, or judgment entered *nunc pro tunc*, unless the facts authorizing such action were exhibited by the record, and that notes made by the judge on the docket or memoranda found among the papers could not be considered.
>
> See also 1 Howard (Miss.), 39; 3 S. & M. (Miss.), 234; 41 Miss., 565.

The court will also find on page 930 of volume 17, Encyclopaedia of Pleading and Practice, very many authorities, both State and Federal, supporting this contention, viz, that there must be a basis for an order *nunc pro tunc*. In the case of *Albers and Born* v. *Whitney et al.* (Story U. S.

Circuit, 310) Judge Story discusses the power of the courts to enter *nunc pro tunc* orders, stating that—

> The doctrine of the English courts in all cases of ordinary suits (excluding fines and recoveries) is that judgments and records are amendable only—first, where the case is within the reach of some statute; and second, where there is something to amend by.
>
> At common law, no judgment was amendable after the term at which it was entered.

In the case of *Cromwell* v. *Bank of Pittsburg* (2 Wall., 586), after discussing with great elaboration the right of amendment and the necessity for the same by reason of misprision, Judge Grier says:

> * * * A court may possibly not have the power to alter or vacate its own judgments truly recorded after the term to which they have been entered. But that any misprision, omission, or mistake of the clerk may be amended at any time, *where the record shows anything to amend by*, has never been doubted since the statute of 1 Edward III, c. 6.

In the case of *Russel* v. *McDougal* (3 S. & M. (Miss.), 234) Chief Justice Sharkey approved this doctrine. Upon this subject, on page 248, he says:

> Courts may amend the mistakes or errors of their clerks, provided there is anything in the record or proceedings to amend by; but at a subsequent term they can not amend their own judgment unless it be in such a

> way as provided for by statute. But in no case can an amendment be made unless there be something to amend by.

In the case of *Moody* v. *Grant* (41 Miss., 565) it was held by Elett, judge, that—

> A record can not be amended after the term, unless there is something in the record to amend by; parol proof of what was done, or a written memorandum of the attorney filed with the papers, is not sufficient to authorize an amendment of the record.

In the case of *Smith* v. *Hood* (25 Pa., 218), this doctrine is also followed, the court stating that an amendment might be made for a clerical mistake in entering a judgment *where there is anything to amend by*.

The supreme court of Illinois in the case of *Morton Culver* v. *Cougle* (165 Ill., 417) follows the case of *Coughran* v. *Gutcheus* (18 Ill., 390), heretofore cited, holding, in effect, that before an amendment can be made—

> There must be some minute in the record by which to amend. After term has expired which judgment was entered a court can not amend a former order unless there be some minute or memorial paper in the record or on the docket to show what the order to be amended in fact was.
>
> *Culver* v. *Cougle* (62 Ill. App., 583), affirmed.

The supreme court of Indiana sanctions this view in the case of *Boyd* v. *Blaisdell* (15 Ind., 73).

This court follows the doctrine laid down in *Albers* v. *Whitney* (1 Story's reports, 310), heretofore cited, and holds expressly upon this point as follows:

> Now, there seems to be an impression that our code has enlarged the power to make amendments in records to an almost indefinite extent, and that judgments may be altered in the discretion of the court. This idea was practiced upon below in the case of *Kyle* v. *Hayward* (14 Ind., 377). We are not prepared to admit the proposition. We doubt whether a judge can alter a judgment after the close of the term where there is nothing to amend by; and he assumes to do it on the ground that the judgment, as entered, does not express the intention of his mind at the time it was entered. This would enable courts to carry their records, and the ultimate rights of parties, about the country in their heads in rather too concealed a manner. What provisions are there in the code justifying such amendments? Misprisions of clerks may be corrected, especially where are data to amend by. Judgments of the courts can not be, as a general rule. There may be exceptions. See the cases in Curtis's Dig., etc.

The supreme court of Missouri in the case of *State ex rel.* v. *Prim* (61 Mo., 166) follows the foregoing authorities, holding:

> A court may at subsequent terms set right mere forms in its judgment or correct misprisions of its clerks or mere clerical errors, so as to conform the record to the truth. And the corrections may be made from the judge's dockets or clerk's minutes or other records pertaining to the case, but not from extraneous testimony, such as affidavits.

The sum and substance of these authorities, which could be largely multiplied, is that before any amendment can be made, *nunc pro tunc* or otherwise, after the expiration of the term there must be something to amend by—some memorial paper or record of some kind. Some of the authorities hold that certain memoranda of the court are sufficient, while other authorities hold that such memoranda are insufficient; but all with unanimity hold that there must be some record or memorial or something by which the amendment can be made. In this case there is an attempt to tack an amendment onto a vacuum.

IV. PROCEEDINGS COLLATERALLY ATTACKED.

The question involved in this case, viz, the citizenship of the appellant, is a question jurisdictional to the Court of Claims. Unless the appellant was a citizen of the United States in the month of February, 1866, the Court of Claims had no jurisdiction under the Indian depredation act of March 3, 1891. (First Supp. R. S., 2d ed., 913.) The fourth finding of the court establishes the fact that the appellant was foreign born and declared his

intention to become a citizen of the United States on the 12th of March, 1858. The Court of Claims was therefore met at the threshold of this case by the fact that this appellant was foreign born; and unless the evidence was satisfactory to establish the court's own jurisdiction—the citizenship of appellant—the petition would necessarily be dismissed.

The court, inquiring into the facts that constituted its own jurisdiction, found that the claim of citizenship of Charles Gagnon was based upon an order *nunc pro tunc* that was rendered thirty-three years after the alleged original decree of naturalization, which of itself was sufficient to put the court upon inquiry as to the right of the court rendering such judgment *nunc pro tunc*, to enter the same.

Upon inquiry the court found, by Findings V and VI, under appellees' construction of Finding V, that the records of the district court of Richardson County, Nebr., wherein the naturalization is said to have been had in 1863, is intact and shows no entry of any decree or order of the court naturalizing the appellant at the time he stated that he was naturalized. The Court of Claims further found, by Finding VI, that there was no record or memoranda or other paper of any kind in the records of said court or among the files thereof showing or relating to the application by Charles Gagnon for naturalization before said dis-

trict court, nor was there any such paper in the records of said court on the 29th and 30th days of March, 1897, when the proceedings for the restoration of the record of naturalization was taken, nor does it appear that a certificate of naturalization was ever issued or delivered to the appellant.

As a basis for the jurisdiction and power of the court to render this order *nunc pro tunc*, the court before which the original proceeding is said to have been had, must have actually had jurisdiction of the party naturalized and of the question before it at the time of the alleged naturalization. Without this jurisdiction in the court originally, the district court for Richardson County, Nebr., in 1897 had no jurisdiction to render the order *nunc pro tunc*. If the records of that court were intact in 1897 and showed no decree of naturalization, and if there was no memoranda or other paper of any kind in the files of the court showing such decree of naturalization in 1863, then the district court of Richardson County, Nebr., in 1897 had no power to render the judgment *nunc pro tunc*.

It seems to be a well-settled proposition that the court wherein the judgment of a sister State is introduced may always inquire into the question of the jurisdiction of the court in which the judgment was rendered over the subject-matter or the parties affected by it and *into the facts necessary to give*

such jurisdiction. Mr. Justice Lamar, in the case of *Simmons* v. *Saul* (138 U. S., 439), said:

> It is the well-settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject-matter or the parties affected by it, nor into the facts necessary to give such jurisdiction. (Citing *Thompson* v. *Whitman*, 18 Wall., 457; *Cole* v. *Cunningham*, 133 U. S., 107.)

In inquiring into the facts that gave the court power and jurisdiction to render this order *nunc pro tunc*, the Court of Claims found, according to appellee's construction of Finding V, that the records of the district court of Richardson County, Nebr., for the year 1863 were intact; that there was no entry or memoranda upon said records showing any naturalization proceeding in 1863 whereby the appellant Gagnon was naturalized; that there was no memoranda or writing of any kind in the files of the court showing that any such proceedings were ever instituted or had; that the district judge and the clerk of the court who had presided and officiated in the year 1863 were both dead; and that the sole evidence upon which the order *nunc pro tunc* was based was oral. Upon this state of the facts the court held that there was no power in the district court of Richardson County,

Nebr., in 1897 to enter a decree of naturalization *nunc pro tunc*.

In his opinion, Peelle, J., stated:

> While lapse of time in a proper case may not take away the right or jurisdiction of a court to make *nunc pro tunc* entries to conform its record to the truth, it is an element to be considered in this case, where there is a total absence of any record showing that the claimant ever applied to become a citizen, and hence the *nunc pro tunc* entry was rather an original order made now for then than an entry made now for then of an order previously made. (R., p. 13.)

V. CONCLUSION.

The appellees stand upon the proposition that the question of the citizenship of the appellant being a question going to the jurisdiction of the Court of Claims, that court had a right to inquire into the facts conferring such jurisdiction. It appearing that such jurisdiction was conferred by an order *nunc pro tunc* of a court which purported to supply a record of something that was done thirty-three years before the date of the decree *nunc pro tunc*, the Court of Claims had a right to inquire into the facts necessary to give the court power and jurisdiction to render the order *nunc pro tunc*. It being made to appear further to the court that the records of the court wherein the original naturalization was alleged to be had were

intact, and it appearing also that at the time the order *nunc pro tunc* was rendered there was no record or memoranda or other paper of any kind in the records of said court or among the files thereof showing or relating to an application by Charles Gagnon for naturalization, etc. (Finding VI), it is most respectfully submitted that the Court of Claims did not exceed its authority in declining to accept the decree *nunc pro tunc* as sufficient evidence to establish the jurisdictional question of the appellant's citizenship.

JOHN G. THOMPSON,
Assistant Attorney-General.

HARRY PEYTON,
Assistant Attorney.

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Supreme Court of the United States.

No. 163.—October Term, 1903.

Charles Gagnon, Appellant,
vs.
The United States and The Sioux and Cheyenne Indians. } Appeal from the Court of Claims.

[March 21, 1904.]

This was a petition filed in the Court of Claims in 1894 and amended in 1902, to recover the value of one-half of certain property taken in 1866 from the firm of which the petitioner was a member by Indians then in amity with the United States.

The facts found in the case were substantially as follows: Charles Gagnon was a British subject. In March, 1858, he declared before the District Court of Woodbury County, Iowa, his intention to become a citizen of the United States. He alleged that in 1863 he was admitted by the District Court of Richardson County, in the Territory of Nebraska, as a citizen of the United States, but no entry of this fact appeared in the records of that court for the year 1863.

It appeared Hosford & Gagnon, under which firm name they traded, owned horses and cattle of the aggregate value of $15,500 and in 1866, without just cause or provocation on their part, Indians belonging to the defendant tribes, then in amity with the United States, took them away. Hosford filed his claim for one-half of the amount and obtained judgment, which has been satisfied. Gagnon's claim was for the remaining half.

It further appeared that in the prosecution of his claim Gagnon failed to produce his certificate of naturalization, or a duly authenticated copy thereof. To meet the requirements of the law, providing that only citizens of the United States can recover under the Indian Depredation Act, Gagnon relied exclusively on a record of the District Court for the first judicial district of the State of Nebraska, (successor of the District Court of the Territory,) purporting to enter *nunc pro tunc* a judgment of naturalization of the Territorial court as of the date of September 25, 1863.

No paper, memorandum or entry of any kind was found in the records of the court tending to show that a certificate of naturalization had been issued to Gagnon in that year. It also appeared that the persons who held the offices of judge and clerk of the Territorial court in 1863 were both dead.

The record of the State court recited that it had been made to appear "by competent evidence" that the alleged application for naturalization

had been granted by the Territorial court, but that the "judgment of naturalization was never recorded, and if recorded the record is lost and cannot be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error and omission be corrected, it is ordered and adjudged that said judgment so rendered by this court at its September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of naturalization," &c.

It further appeared that on March 19, 1897, Gagnon's attorneys wrote the Attorney General that application would be made to the District Court of Richardson County, Nebraska, on March 29, 1897, "for restoration of certain lost records relative to the naturalization of said Gagnon."

Upon the facts thus found the Court of Claims decided that Gagnon was not a citizen of the United States at the time the depredation was committed, and the petition was dismissed. (38 Ct. of Clms. 10.) Thereupon an appeal was taken to this court.

Mr. Justice BROWN delivered the opinion of the Court.

This case raises the simple question whether thirty-three years after a judgment naturalizing an alien is alleged to have been rendered but not recorded, or if recorded, the record lost, a common law court has jurisdiction to enter such judgment of naturalization *nunc pro tunc*, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered. If there be no jurisdiction to enter such judgment, it may be attacked collaterally.

The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice, and was recognized by this court *In re Wight*, (134 U. S. 136;) *Gonzales* v. *Cunningham*, (164 U. S. 612, 623,) and *United States* v. *Vigil*, (10 Wall. 423.) It is also conferred upon courts of the United States by R. S., secs. 899, 900 and 901. This power, however, must be distinguished from that discussed by the court in *Bronson* v. *Schulten*, (104 U. S. 410,) wherein we held that the authority of the court to set aside or modify an existing judgment or order ceased with the expiration of the term, and from that time all final judgments and decrees passed beyond its control, and that if such errors existed they could only be corrected by writ of error or appeal to a superior tribunal. An exception was there made of certain mistakes of fact not put in issue or passed upon, such as that a party died before judgment, or was a married woman, or was an infant and no guardian appeared or was appointed, or that there was error in the process through

the default of the clerk. In the Federal courts the power to amend is given in general language in the final clause of R. S., section 954, which declares that such courts "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." As above indicated, however, this power has been restricted to amendments made during the progress of the case, or at least during the continuance of the term in which the judgment is rendered.

This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word "repair" is wholly inapplicable to its subsequent reconstruction. The word "repair," as the word "amend," contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise. In the cases of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common law and maritime courts.

The power to recreate a record, no evidence of which exists, has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. We have examined a large number of authorities upon this point, and while they do not altogether harmonize in their conclusions, the practice in some States being much more rigid than in others, we have found none which supports the contention that a record may be created to take the place of one of which no written memorandum was made or entered at the time the original judgment was supposed to have been rendered. The following cases contain instructive discussions of the principles involved, but an epitome of them would subserve no useful purpose: *Bilansky* v. *Minnesota,* (3 Minn. 427;) *Schoonover* v. *Reed,* (65 Ind. 313;) *Smith* v. *Hood & Co.,* (25 Pa. 218;) *Missouri* v. *Primm,* (61 Mo. 166;) *Brown* v. *Coward,* (3 Hill [S. C.] 4;) *Lynch* v. *Reynolds,* (69 Ky. 547;) *Coughran* v. *Gutcheus,* (18 Ill. 390;) *Frink* v. *Frink,* (43 N. H. 508;) *Rugg* v. *Parker,* (7 Gray, 172;) *Balch* v. *Shaw,* (7 Cush. 282.)

The power of the court to amend existing records is also considered at length in the following cases from the Federal courts: *Tilghman* v. *Werk,* (39 Fed. Rep. 680;) *Whiting* v. *Equitable Life,* (60 Fed. Rep. 197, 200;) *Odell* v. *Reynolds,* (70 Fed. Rep. 656, 659;) *Blythe* v. *Hinckley,* (84 Fed. Rep. 228, 244.)

It may be gathered from these cases that, if a memorandum be entered upon the calendar that a certain document has been filed, such document, if lost, may be supplied by a copy in the hands of counsel; or where a judgment or order has been entered upon the calendar, which does not appear upon the journal, the court may order a new one to be entered *nunc pro tunc*. In such cases there is often a memorandum of some kind entered upon the calendar, or found in the files, and there is no impropriety in ascertaining the fact even by parol evidence, and supplying the missing portion of the records. But the exercise of a power to recreate a record where no memorandum whatever exists of such record is evidently a dangerous one, and, although such power may have been occasionally given by the legislature in cases of overwhelming necessity, as, for instance, by the "lost record act" passed by the general assembly of Illinois after the great fire in Chicago in 1870, (Laws of Illinois, 1871–2, p. 650,) such power has not been hitherto supposed to be inherent in courts of general jurisdiction. As the evidence upon which such restoration is made cannot be inquired into, if the jurisdiction to recreate the record exists, it might well happen that, upon the testimony of a single interested witness, the court would order a new record to be entered after a lapse, as in this case, of over thirty years, and when the judge and clerk have both died, and there was no possibility of contradicting the testimony of such single witness.

Additional complications may also be properly referred to in this case in the fact that the declaration of intention was made before another court in another State, and that the Territorial court which is alleged to have entered the judgment of naturalization had itself been abolished and a State court substituted in its place. Did the jurisdiction exist to make this order of naturalization, there is nothing to prevent any person from applying to any competent court for a similar judgment of naturalization, or even a judgment for damages, and to have the same entered *nunc pro tunc* as of any date it would be for his interest to have it rendered. It is true that in this case notice was given to the Attorney General by the petitioner of his proposed application to the court for the restoration of "certain lost records," but if the jurisdiction to enter this judgment *nunc pro tunc* did not exist, it could not be given by this notice.

As there was no competent evidence of the citizenship of the petitioner, there was no error in the action of the court below, and its judgment is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.